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**Note**

**\*437 ALCOHOLICS ANONYMOUS AS A CONDITION OF DRUNK DRIVING PROBATION: WHEN DOES IT AMOUNT TO ESTABLISHMENT OF RELIGION?**

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For nearly two decades state legislatures have been wrestling with the problem of drunk driving. In an effort to attack this problem at its core, most drunk driving legislation currently in effect contains educational and rehabilitation requirements, and many driving while intoxicated (DWI) offenders are sentenced to probation rather than incarceration. As part of their probationary conditions, DWI offenders are often directed to participate in alcohol-related self-help programs such as Alcoholics Anonymous (AA). Requiring AA as a probationary condition for DWI offenses, however, raises serious constitutional issues under the First Amendment's Establishment Clause because the AA program of recovery is religiously oriented. This Note contends that compulsory AA as a condition of drunk driving probation violates the Establishment Clause. What this Note views as the more complex issue, however, is what exactly amounts to compulsory AA. After surveying the relevant case law, this Note presents a nonexhaustive list of factors courts might examine in the course of addressing this inquiry. A review of AA's approach to rehabilitation, leads the author to conclude that AA qualifies as a religious program for purposes of the Establishment Clause. The author also argues that the applicable case law indicates that an Establishment Clause violation will only be found where the probationer has been denied the freedom to choose between religious and nonreligious support programs. To prevent state authorities charged with formulating DWI probationary conditions from committing future Establishment Clause violations, the author recommends legislative or administrative guidelines similar to California's administrative scheme designed to guarantee state compliance with the Establishment Clause. Such guidelines would both safeguard probationers' constitutional rights and protect state probation authorities from potential liability.

Introduction

In response to a rising tide of public concern, the legislatures of all fifty states enacted or reinforced a total of 500 driving while intoxicated (DWI) [\[FN1\]](#) laws in the early 1980s. [\[FN2\]](#) A major and nearly universal component \*438 of these statutes was mandatory or discretionary educational and rehabilitative programs for those convicted of DWI. [\[FN3\]](#) These programs typically include driver education programs, as well as alcohol rehabilitation and education programs. [\[FN4\]](#) Either in addition to, or in satisfaction of, this rehabilitation requirement, convicted drunk drivers may be required to participate in alcohol-related self-help programs such as Alcoholics Anonymous (AA). DWI offenders--whether first-time or repeat--are often granted a choice of sentence: incarceration or probation conditioned on participation in an alcohol rehabilitation program. [\[FN5\]](#) Offenders failing to satisfy the probationary requirements potentially face incarceration.

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Imagine now a DWI offender granted probation under such a scheme provided she satisfies a facially neutral condition: attendance at the alcohol-related self-help group of her choice. As it turns out, the only local self-help group is founded upon explicitly religious principles--its meetings often open with the Serenity Prayer and close with the Lord's Prayer, [\[FN6\]](#) and participants are required to commit to surrender themselves to God. Surprisingly, this scenario is firmly grounded in reality: the religiously oriented self-help group depicted in the hypothetical is none other than AA. AA relies heavily on religious tenets and prayer to assist those with alcohol-related problems. [\[FN7\]](#) DWI offenders who choose probation over imprisonment may be required to attend AA as a condition of probation. [\[FN8\]](#) Because AA's approach to rehabilitation is arguably religious, attending **\*439** AA to fulfill a state-directed probationary condition raises serious constitutional questions under the First Amendment's Establishment Clause. [\[FN9\]](#) This problem--and its proper resolution in policy and constitutional law--is explored in this Note.

**\*440** Part I provides an overview of AA and its tenets, considers whether AA qualifies as a religious program for purposes of the Establishment Clause, and discusses how alcohol-related self-help group attendance may be made a probationary requirement. Part II examines the relevant Establishment Clause tests adopted by the Supreme Court and reviews how lower courts have applied such tests in cases pertaining to probation and AA. Part III explores when the Establishment Clause permits probationers to attend AA to satisfy probationary requirements as well as evaluates California's administrative scheme designed to guarantee state compliance with the Establishment Clause.

## I. Alcoholics Anonymous

This Part provides a brief overview of AA and demonstrates the intensely religious character of its rehabilitative approach. It next evaluates the religiousness of AA for constitutional purposes and finally discusses how attendance at self-help group meetings, including AA, may be made a probationary condition.

### **\*441** A. The Alcoholics Anonymous Program of Recovery

With more than 95,000 chapters and 1,900,000 members worldwide, AA is the leading self-help, rehabilitative organization for alcoholics. [\[FN10\]](#) The book *Alcoholics Anonymous* (Big Book) [\[FN11\]](#) is the central text of AA and is often referred to as the 'Bible' by AA members. [\[FN12\]](#) Although the foreword to the Big Book states that AA is "not allied with any particular faith, sect or denomination," [\[FN13\]](#) AA was established on monotheistic principles, [\[FN14\]](#) and AA's founders, Bill Wilson and Dr. Robert Smith, were greatly influenced by the religious doctrine of the Oxford Group, an evangelical Christian group. [\[FN15\]](#)

The 'Twelve Steps and Twelve Traditions' appearing in the Big Book further illustrate the significance of religious principles to the AA program of recovery. The Twelve Traditions comprise the rules governing AA. The second of the Twelve Traditions states: 'For our group purpose there is but one ultimate authority--a loving God as He may express Himself in our group conscience.' [\[FN16\]](#) The Twelve Steps in turn represent **\*442** the cornerstone of the AA program of recovery and are often recited at meetings: [\[FN17\]](#)

1. We admitted we were powerless over alcohol--that our lives had become unmanageable.
2. Came to believe that a Power greater than ourselves could restore us to sanity.
3. Made a decision to turn our will and our lives over to the care of God as we understood Him.
4. Made a searching and fearless moral inventory of ourselves.
5. Admitted to God, to ourselves, and to another human being the exact nature of our wrongs.

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6. Were entirely ready to have God remove all these defects of character.
7. Humbly asked Him to remove our shortcomings.
8. Made a list of all persons we had harmed, and became willing to make amends to them all.
9. Made direct amends to such people wherever possible, except when to do so would injure them or others.
10. Continued to take personal inventory and when we were wrong promptly admitted it.
11. Sought through prayer and meditation to improve our conscious contact with God as we understood Him, praying only for knowledge of His will for us and the power to carry that out.
12. Having had a spiritual awakening as the result of these steps, we tried to carry this message to alcoholics, and to practice these principles in all our affairs. [\[FN18\]](#) Steps two, three, five, six, seven, and eleven all refer to God, a higher power, or prayer. In fact, the word 'God' appears 132 times in the Big Book and pronouns for 'God' are mentioned eighty times. [\[FN19\]](#) Furthermore, group prayer is commonplace at AA meetings; AA meetings frequently commence with a recitation of the Serenity Prayer and usually end with members joining hands and reciting the Lord's Prayer. [\[FN20\]](#) Despite the numerous references to God and prayer at AA meetings and \*443 throughout AA literature, AA characterizes itself as a spiritual, rather than religious, organization. [\[FN21\]](#) And while AA relies heavily on the Twelve Steps, AA 'does not demand that you believe anything. All of its Twelve Steps are but suggestions.' [\[FN22\]](#)

#### B. A Preliminary Matter: Determining Whether Alcoholics Anonymous Is a Religious Program for Purposes of the Establishment Clause

Because the Establishment Clause prohibits government from establishing 'religion,' the threshold inquiry in determining whether the imposition\*444 of AA as a probationary condition violates that clause is whether AA qualifies as a 'religious' program. Much judicial and scholarly ink has been spilt in an effort to define the First Amendment's term 'religion.' The Supreme Court has grappled with this issue primarily in the context of its Free Exercise (and not its Establishment) Clause jurisprudence, and although the term 'religion' appears only once in the First Amendment, many commentators have suggested that courts should apply clause-specific definitions of religion. [\[FN23\]](#)

\*445 Because theism and prayer, two quintessentially religious concepts, are fundamental to the AA program of recovery, defining religion is a much less significant enterprise in this context. As noted by one scholar, it is only 'when the presence of religion is seriously controverted, [that] the threshold question, Copr.defining religion,' becomes important' and in 'most cases arising under [the] religion clauses, the religiousness of an activity or organization will be obvious.' [\[FN24\]](#) Tension arises between the First Amendment's religion clauses primarily, if not exclusively, where the issue is whether a nontraditional system of beliefs warrants the label 'religion.' When traditional religious principles are involved, however, the Free Exercise and Establishment Clause definitions of religion converge rather than conflict. [\[FN25\]](#) Therefore, because AA relies on traditional religious principles, the Supreme Court's Free Exercise and Establishment Clause jurisprudence are both instructive in determining whether AA is 'religious' for purposes of the Establishment Clause, and have led most courts addressing this issue—including the United States Courts of Appeals for the Second and Seventh Circuits, the United States District Court for the Southern District of New York, and the New York Court of Appeals—to conclude that it is. [\[FN26\]](#)

\*446 AA's literature and approach to rehabilitation provide the basis for this conclusion. First, AA was founded on monotheistic principles and theism has always qualified as religion under the First Amendment. [\[FN27\]](#) Second, the nucleus of the AA program is the Twelve Steps. [\[FN28\]](#) Central to the Twelve Steps are the concepts of God, a higher power, and prayer. Although AA characterizes such principles as spiritual and not religious, courts, to determine whether an organization is religious, 'must examine the nature of the organization in practice and as administered, not merely defer to self-definition.' [\[FN29\]](#) Furthermore, whether 'a given practice constitutes a forbidden establishment may

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ultimately depend on whether most people would view it as religiously significant.' [\[FN30\]](#) Like theism, 'Copr.[p]rayer' holds religious significance for most people.' [\[FN31\]](#)

\*447 The most thorough analysis of AA's religiousness thus far was undertaken by the New York Court of Appeals in *Griffin v. Coughlin*. [\[FN32\]](#) Griffin, a prison inmate, challenged the prison's policy of conditioning participation in the Family Reunion Program on attendance in an Alcohol and Substance Abuse Treatment Program incorporating the 'Copr.Twelve Steps' and Copr.Twelve Traditions' credos of Alcoholics Anonymous.' [\[FN33\]](#) After a comprehensive examination of AA, the Twelve Steps, and Twelve Traditions, as well as extensive quotation from the texts of the Big Book and Twelve Traditions, the Griffin court stated:

Concededly, there are passages in A.A. literature . . . which . . . eschew any intent to impose a particular sectarian set of beliefs or a particular concept of God upon participants. However, a fair reading of the fundamental A.A. doctrinal writings [i.e., the Big Book and Twelve Steps and Twelve Traditions texts] discloses that their dominant theme is unequivocally religious, certainly in the broad definitional sense as 'manifesting faithful devotion to an acknowledged ultimate reality or deity.' Indeed, the A.A. basic literature most reasonably would be characterized as reflecting the traditional elements common to most theistic religions. Thus, God is named or referred to in five of the 12 steps. 'Working' the 12 steps includes confessing to God the 'nature of our wrongs' (Step 5), appealing to God 'to remove our shortcomings' (Step 7) and seeking 'through prayer and meditation' to make 'contact' with God and achieve 'knowledge of His Will' (Step 11).

. . . .  
[An analysis of the Big Book and Twelve Steps and Twelve Traditions texts] demonstrates beyond peradventure that doctrinally and as actually practiced in the 12-step methodology, adherence to the A.A. fellowship entails engagement in religious activity and religious proselytization. Followers are urged to accept the existence of God as a Supreme Being, Creator, Father of Light and Spirit of the Universe. In 'working' the 12 steps, participants become actively involved in seeking such a God through prayer, confessing wrongs and asking for removal of shortcomings. These expressions and practices constitute, as a matter of law, religious exercise for Establishment Clause purposes . . . .

. . . .  
. . . We have purposely quoted at length from the A.A. doctrinal texts to eliminate any doubt but that the references to God and prayer in the Twelve Steps were intended in their 'conventional \*448 sense.' That is, the A.A. basic doctrinal writings clearly express a preference for and a conviction favoring a concept of God and prayer which is not merely 'Copr.a conscientious social belief, or a sincere devotion to a high moralistic philosophy [but] one based upon an individual's belief in his responsibility to an authority higher and beyond any worldly one.' [\[FN34\]](#)

On the basis of similar analysis, judicial consensus is emerging behind the proposition that AA is a religious program for Establishment Clause purposes. [\[FN35\]](#) Therefore, courts facing cases that involve the issue of AA's religiousness should devote little, if any, analysis to this question. [\[FN36\]](#)

### C. Imposing Alcohol-Related Self-Help Group Attendance as a Probationary Condition

The primary purpose of probation is the rehabilitation of the offender. [\[FN37\]](#) To serve this purpose, trial judges possess broad discretion in setting conditions of probation. [\[FN38\]](#) All fifty states have statutes permitting judges, in appropriate circumstances, to impose probation rather than incarceration and to determine probationary conditions. [\[FN39\]](#) DWI offenders are sentenced to attend self-help programs usually under one of two schemes. The primary way attendance at self-help programs is made a condition of probation is through the judge's broad statutory power to fashion probationary conditions. [\[FN40\]](#) The second and less customary method for sentencing DWI offenders to attend self-help programs is according to "rules made pursuant to state drunk driving statutes creat[ing] a post-conviction system for determining the appropriate punishment \*449 and rehabilitation for the drunk driver." [\[FN41\]](#) Typically, these post-conviction systems include procedures whereby probation departments classify offenders according to the seriousness of their alcohol problem. [\[FN42\]](#) In turn, this classification determines the probation department's recommendation regarding rehabilitation and this recommendation is generally followed by the sentencing judge. [\[FN43\]](#) Therefore,

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although the trial judge remains ultimately responsible for sentencing the DWI offender to attend a self-help program, under this scheme the state legislature also plays a very active role. [\[FN44\]](#)

## II. Prevailing Law: Alcoholics Anonymous, Probation, and the Establishment Clause

Because of AA's religiously based approach toward rehabilitation, serious constitutional questions arise when AA attendance is required by the state as a condition of probation. This Part will discuss briefly the two Establishment Clause tests used by federal courts to decide the constitutionality of AA participation as a probationary condition. Next, it will examine decisions applying these Establishment Clause tests in the AA context. Finally, it will discuss how the holdings of these cases can be reconciled.

### A. Establishment Clause Tests

The Establishment Clause states that 'Congress shall make no law respecting an establishment of religion.' [\[FN45\]](#) While four tests are available to courts determining whether a particular practice violates the Establishment Clause, courts evaluating the constitutionality of AA participation in fulfillment of probationary conditions have only applied the tests announced by the Supreme Court in *Lemon v. Kurtzman* [\[FN46\]](#) and *Lee v. Weisman*. [\[FN47\]](#)

**\*450** 1. *Lemon v. Kurtzman*.--During the 1970s and 1980s, the primary standard used by courts to determine whether a particular practice or policy satisfied the Establishment Clause was the tripartite test announced in *Lemon v. Kurtzman*. [\[FN48\]](#) *Lemon* concerned the constitutionality of Pennsylvania and Rhode Island statutes providing state aid to nonpublic elementary and secondary schools, including parochial schools. Both statutes provided for reimbursement for teachers' salaries, and the Pennsylvania statute provided for further assistance with instructional materials and textbooks. [\[FN49\]](#) To evaluate these statutes, the Court considered 'the cumulative criteria developed by the Court over many years' and determined that '[t]hree such tests [could] be gleaned from [its] cases.' [\[FN50\]](#) Under *Lemon*'s tripartite inquiry, a statute will survive Establishment Clause challenge if (1) it has a secular legislative purpose; (2) 'its principal or primary effect . . . neither advances nor inhibits religion'; and (3) it does 'not foster Govt.an excessive government entanglement with religion.' [\[FN51\]](#) The *Lemon* Court concluded that both the Rhode Island and Pennsylvania statutes violated the third prong of the test by promoting excessive entanglement between government and religion. [\[FN52\]](#)

For the next twenty years, the Court primarily applied *Lemon* to decide Establishment Clause cases. Nevertheless, Justices and scholars alike criticized the *Lemon* test as vague and ambiguous and for promoting ad hoc decisionmaking. [\[FN53\]](#) Several of the Court's recent decisions suggest that a majority of the Justices has heeded these criticisms. Instead of explicitly **\*451** overruling *Lemon*, however, the Court appears to have done so implicitly, abandoning *Lemon* in various Establishment Clause contexts in favor of several alternative tests. [\[FN54\]](#)

2. *Lee v. Weisman*.--The Court adopted its most recent Establishment Clause test--the coercion test--in *Lee v. Weisman*. [\[FN55\]](#) A practice violates the Establishment Clause under the coercion test if the government 'coerce[s] anyone to support or participate in religion or its exercise.' [\[FN56\]](#) In *Lee*, the Supreme Court held that a public high school **\*452** conducted a formal religious exercise in violation of the Establishment Clause when the school principal invited a rabbi to lead a nonsectarian graduation prayer. [\[FN57\]](#) Applying the coercion test, the Court reasoned that the principal, a state actor, directed a formal religious exercise, which coerced students' participation because attendance at graduation was obligatory. [\[FN58\]](#) The *Lee* Court explicitly passed on the question of whether this coercion analysis would apply to mature adults and limited its holding to the primary and secondary school graduation ceremony context. [\[FN59\]](#)

Furthermore, the *Lee* majority and dissent had very different ideas on the meaning of coercion. Justice Kennedy's majority opinion principally defined coercion in terms of psychological coercion--peer or social pressure to participate in the religious event:

The undeniable fact is that the school district's supervision and control of a high school graduation ceremony places

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public pressure, as well as peer pressure, on attending students to stand as a group or, at least, maintain respectful silence during the invocation and benediction. This pressure, though subtle and indirect, can be as real as any overt compulsion. [\[FN60\]](#) Therefore, because this peer pressure unacceptably placed 'objectors in the dilemma of participating . . . or protesting," the Court held that the prayer violated the Establishment Clause. [\[FN61\]](#)

Writing for the dissent, Justice Scalia sharply criticized Justice Kennedy's psychological coercion test. [\[FN62\]](#) Justice Scalia had 'no quarrel with the Court's general proposition that the Establishment Clause Copr.guarantees that government may not coerce anyone to support or participate in religion or its exercise." [\[FN63\]](#) Instead, Justice Scalia defined coercion as legal coercion--'coercion of religious orthodoxy and of financial support \*453 by force of law and threat of penalty.' [\[FN64\]](#) Because students' attendance at graduation was voluntary and because those students choosing not to attend were not subject to penalty or discipline, Justice Scalia would have upheld the graduation prayer.

## B. Alcoholics Anonymous and the Establishment Clause

To date, the constitutionality of AA participation in fulfillment of probationary conditions has faced only two challenges in the federal courts. [\[FN65\]](#) In *Warner v. Orange County Department of Probation* (Warner III), the Court of Appeals for the Second Circuit affirmed the district court's holding that under the Lee coercion test, state-compelled AA as a probationary condition violated the Establishment Clause. [\[FN66\]](#) In *O'Connor v. California*, the Federal District Court for the Central District of California applied the Lemon test to conclude that 'requiring a person convicted of drunk driving to attend a self-help program, where the principal program available is Alcoholics Anonymous, does not violate the Establishment Clause.' [\[FN67\]](#) These cases illustrate two poles of AA's career as a probationary condition, in practice and in the courts. Warner III offers the paradigmatic example of compulsory AA, a constitutionally infirm condition of probation, while O'Connor models a flexible approach that constitutionally permits, in certain instances, AA attendance in fulfillment of probationary conditions. Although the cases reach opposing results, they are in fact reconcilable and, indeed, mutually supportive.

1. *Warner v. Orange County Department of Probation*.--Because of the dearth of case law examining the constitutionality of AA participation as a probationary condition, this subsection presents the trilogy of Warner decisions. For clarity's sake, the district court's decision denying the Department of Probation's motion to dismiss Warner's s 1983 claim will be referred to as Warner I; the district court's decision reaching the merits of Warner's s 1983 claim will be referred to as Warner II; and the Second Circuit's decision affirming the district court's Warner II holding will be referred to as Warner III.

a. Warner I.--Robert Warner was convicted of his third alcohol-related driving offense within a period slightly greater than one year and received a sentence of three years probation. [\[FN68\]](#) The sentence also included several 'conditions of probation,' the fifth stating that Warner 'will attend Alcoholics Anonymous at the direction of [his] probation officer.' \*454 [\[FN69\]](#) Warner, an atheist, filed suit requesting injunctive relief and compensatory damages under [42 U.S.C. s 1983](#) [\[FN70\]](#) claiming that 'his forced participation in AA as an element of his probation constituted a violation of the Establishment Clause.' [\[FN71\]](#) Warner specifically objected to AA's use of the Twelve Steps and group prayer, which included the recitation of the Lord's Prayer and the Serenity Prayer. [\[FN72\]](#)

Although the court rejected as moot Warner's request for injunctive relief, [\[FN73\]](#) it held that Warner stated a valid [s 1983](#) claim for compensatory damages and refused to grant the defendant's motion to dismiss. [\[FN74\]](#) In reaching its holding, the court employed both the Lemon and Lee tests. Applying the Lemon test, the Warner I court concluded that compelled AA participation satisfied Lemon's first prong because preventing drunk driving is a secular purpose. [\[FN75\]](#) The court reasoned, however, that because AA relies upon religious indoctrination to rehabilitate members, mandatory AA potentially violated Lemon's second prong, and therefore found that Warner's complaint adequately alleged a violation of the Establishment Clause. [\[FN76\]](#) Furthermore, the court reasoned that the state court's directing Warner to attend AA could be viewed as excessive government entanglement with religion in violation of Lemon's third element. [\[FN77\]](#)

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Recognizing that the questionable status of *Lemon* counseled against 'undue reliance' on that precedent, the Warner I court also applied the coercion test announced in *Lee*. [FN78] Although the *Lee* holding was limited to students, [FN79] the Warner I court refused to hold as a matter of law that Warner, 'a recovering alcoholic facing the threat of incarceration, [was] significantly less susceptible to the coercive pressure he allege[d] occurred in the AA meetings than were the secondary school students to the coercive pressure they experienced during the prayers offered at their graduation ceremony.' [FN80] The court questioned whether the pressure \*455 Warner experienced at AA meetings was not in fact more forceful than that exerted upon the schoolchildren because AA emphasizes the alcoholic's powerlessness over alcohol and need to find a spiritual basis of life. [FN81] Thus, the court denied the Department of Probation's motion to dismiss.

b. Warner II.--In Warner II, the court addressed the merits of Warner's claim for declaratory and compensatory relief on his Establishment Clause claim. [FN82] Concluding that AA is "essentially religious in nature," [FN83] the court stated that the AA "meetings plaintiff attended were the functional equivalent of religious exercise, and thus should be treated as religious exercise for purposes of the Establishment Clause." [FN84] As in Warner I, the court's finding was motivated by AA's reliance on the Big Book, the Twelve Steps, and group and individual prayer, as well as AA's emphasis on the importance of surrendering one's will to a higher power. [FN85]

Next, the court addressed whether state-compelled AA participation violated the Establishment Clause. Focusing on the compulsory nature of the challenged probationary condition, the court applied *Lee*, ignoring *Lemon* altogether. The court cited *Lee* for the proposition that the Establishment Clause means that, at a minimum, 'government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which Copr.establishes a [state] religion or religious faith, or tends to do so.' [FN86] Because Warner faced confinement in the event that he failed to comply with the conditions of probation, the court concluded that he was '[u]nquestionably' coerced into attending AA meetings. [FN87] Therefore, because AA constituted religious exercise and because the state coerced Warner into attending AA, the court held that Warner's sentence violated the Establishment Clause and awarded Warner nominal damages in the amount of one dollar [FN88] and attorney's fees. [FN89]

\*456 c. Warner III.--On appeal, the Second Circuit--in an opinion originally published in the advance sheet of the Federal Reporter, but subsequently withdrawn from the bound volume because a petition for rehearing was filed [FN90]--affirmed the Warner II court's conclusions that the AA meetings Warner attended were religious for constitutional purposes, that Warner was forced to attend AA, [FN91] that the *Lee* coercion test was the applicable Establishment Clause test, and that Warner's sentence of compulsory AA attendance therefore amounted to a violation of the Establishment Clause. [FN92] The court expressed 'no doubt' that the AA meetings Warner attended were 'intensely religious events,' and accordingly devoted very little attention to the issue of AA's religiousness. [FN93] Instead, \*457 the majority of the court's Establishment Clause analysis addressed coercion:

There can be no doubt . . . that Warner was coerced into participating in these religious exercises by virtue of his probation sentence. Neither the probation recommendation, nor the court's sentence, offered Warner any choice among therapy programs. The probation department's policy, its recommendation, and its printed form all directly recommended A.A. therapy to the sentencing judge, without suggesting that the probationer might have any option to select another therapy program, free of religious content. Once sentenced, Warner had little choice but to attend the A.A. sessions. If Warner failed to attend A.A., he would have been subject to imprisonment for violation of probation.

Had Warner been offered a reasonable choice of therapy providers, so that he was not compelled by the state's judicial power to enter a religious program, the considerations would be altogether different. [FN94] Warner's inability to choose among self-help groups was obviously critical to the court's finding of religious coercion.

Because AA meetings constituted religious exercise that Warner was coerced to participate in, the Warner III court applied the *Lee* coercion test and held that state-imposed AA participation violated the Establishment Clause. Noting that the contested probationary condition was squarely at odds with *Lee*'s familiar proposition that 'Copr.at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise,' the court dismissed the parties' additional analyses of the case applying alternative Establishment Clause tests. [FN95]

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The court also found unpersuasive the Department of Probation's argument that Lee was inapplicable because Warner, as an adult, was less vulnerable to social pressure to participate in the religious exercise than the children in Lee. [FN96] The Department of Probation distinguished between attendance and participation, arguing that although forced to attend AA, once there, Warner was not compelled to participate in the AA meetings. [FN97] Rejecting this argument, the court stated:

\*458 Although it is true Warner was more mature, his exposure was more coercive than the school prayer in Lee. The plaintiff in Lee was subjected only to a brief two minutes of prayer on a single occasion. Warner, in contrast, was required to participate in a long-term program of group therapy that repeatedly turned to religion as the basis of motivation. And when he appeared to be pursuing the Twelve Steps of the A.A. program with insufficient zeal--'Thirteen Stepping' in A.A. parlance--the probation officer required that he attend 'Step meetings' to intensify his motivation. Warner was also paired with another member of A.A. as a method of enhancing his indoctrination into the group's approach to recovery from alcoholism. Most importantly, failure to cooperate could lead to incarceration. [FN98]

d. The Warner III Dissent and an Answer from Precedent.--Judge Winter, dissenting in Warner III, questioned the majority's conclusion that had Warner been provided with a 'reasonable choice of therapy providers' the Department of Probation would not have violated the Establishment Clause. Judge Winter also asserted that if compulsory AA violated the Establishment Clause it was because the government lacked the requisite neutrality between religion and nonreligion, and not because Warner was coerced to participate in AA.

In finding an Establishment Clause violation, my colleagues rely heavily upon the fact the probation authority did not recommend to the sentencing court that Warner have a choice between A.A. and a non-religious rehabilitation program. As a result, he was, in their view, coerced into participation in A.A. . . . Although . . . coerced participation in religious ceremonies may be a factor in finding an Establishment Clause violation, it is not a necessary element of such a claim, and a choice among all available options is not a remedy for a valid Establishment Clause claim.

....  
If attendance at A.A. meetings as a condition of probation violates the Establishment Clause, it is because such a condition entails governmental sponsorship of religion over nonreligion. Following the logic of Establishment Clause jurisprudence, it would seem to me that such a condition is a violation whether or not the only person directly affected, the probationer, preferred a religiously oriented program over a secular one.

....  
To be sure, my colleagues do not hold that attendance at A.A. meetings can never be a condition of probation. Indeed, they expressly state that Warner should have been given a choice, a statement I take to mean that persons facing a sentence for alcohol-related offenses may constitutionally be offered a choice between A.A. meetings (or other religiously-based \*459 rehabilitation programs) and alternative secular programs as a condition of probation. My disagreement is simply over whether such a choice is required, or even permitted, by the Establishment Clause. [FN99]

A line of Supreme Court decisions concerning financial assistance to religious institutions demonstrates that choice is constitutionally significant in certain Establishment Clause contexts and provides a framework for examining the Warner III majority and dissenting opinions focusing on coercion and neutrality, respectively. In *Mueller v. Allen*, the Court held that a Minnesota statute allowing parents of elementary and secondary school children state income tax deductions for certain educational expenses did not violate the Establishment Clause. [FN100] Central to the Court's decision was the deduction's generally applicable nature. The deduction was available to all parents of school-age children, 'including those whose children attend public schools and those whose children attend nonsectarian private schools or sectarian private schools.' [FN101] The Court distinguished between direct and indirect aid to religion, noting that aid became available 'only as a result of numerous private choices of individual parents of school-age children.' [FN102]

Three years later, in *Witters v. Washington Department of Services for the Blind*, the Court unanimously held that a state does not violate the Establishment Clause by paying a blind student's tuition at a sectarian theological institution through a generally applicable financial aid program. [FN103] As in *Mueller*, the Court distinguished between direct and indirect aid, reasoning that any 'aid provided under [the state's] program that ultimately flows to religious institutions does so only as a result of the genuinely independent and private choices of aid recipients.' [FN104] Therefore, because

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the individual, and not the state, made the decision to support the religious institution, constitutionally required government neutrality toward religion was maintained. [\[FN105\]](#) \*460 Although pertaining to government financial support of religious institutions, and not government-coerced religious participation, the direct/indirect distinction of the Witters line of cases is closely analogous to the compulsory AA/AA- nonreligious alternative scenario. Because AA qualifies as a religious program, when the state orders a probationer to attend AA it violates the mandate that government may not coerce anyone to participate in religious exercise, and concomitantly violates the principle of neutrality--if not neutrality among religions, at least neutrality between religion and nonreligion. [\[FN106\]](#) For this reason, the Establishment Clause is violated regardless of the probationer's preferences. Where, however, the state offers the probationer a choice between AA and a nonreligious alternative, or instructs the probationer to attend the self-help group of his choice, there is no Establishment Clause violation. [\[FN107\]](#) In this context, the state does not coerce the probationer to attend AA, but rather requires an independent choice among service providers and thus remains neutral. Like the aid recipients' choices in Mueller and Witters, choosing AA from a range of secular and nonsecular alternatives is a decision of the individual, not the state, and thus comports with the Establishment Clause. [\[FN108\]](#)

2. O'Connor v. California.--Edward O'Connor, a repeat DWI offender, was convicted of DWI in 1992. [\[FN109\]](#) As part of his probation, the Orange County Municipal Court ordered O'Connor to enroll in the county's alcohol and drug education program, an eighteen-month, state-licensed program administered by the National Council on Alcoholism \*461 and Drug Dependence. [\[FN110\]](#) The Council also advised O'Connor that in addition to attending its meetings, he must attend unspecified 'self-help' meetings on a weekly basis in order to fulfill Orange County's 'additional program' requirements. [\[FN111\]](#) In Orange County, it was the probationer's responsibility to find a complying self-help program. [\[FN112\]](#) AA and Rational Recovery, a leading secular alternative, however, were pre-approved programs, whereas participation in other programs first required county authorization. [\[FN113\]](#) O'Connor alleged that when he attended the additional program the only self-help group he was informed of was AA. [\[FN114\]](#) O'Connor filed a motion with the Municipal Court for a modification of his probationary conditions, requesting the elimination of the self-help meeting requirement. The court denied the motion, reasoning that O'Connor could attend Rational Recovery to fulfill his probationary requirements. [\[FN115\]](#) In February 1993, O'Connor brought suit in federal district court against the State of California claiming that its endorsement and promotion of AA violated the Establishment Clause.

The O'Connor court characterized Lemon as the "prevailing three-part test for compliance with the First Amendment's Establishment Clause" and, applying Lemon, concluded that no Establishment Clause violation had been committed. [\[FN116\]](#) Concerning the first prong, the court asserted that the 'primary purpose of requiring attendance at self-help meetings such as AA is to prevent drunk driving and the tragic injuries and deaths that result from it, while at the same time providing treatment for individuals with substance abuse problems.' [\[FN117\]](#) Turning to the third prong, the court found no entanglement because 'AA does not receive any money, materials, or administrative input from religious groups or institutions, nor does it receive any money from the State or County in exchange for accepting those convicted of drunk driving.' [\[FN118\]](#) Focusing primarily on Lemon's second prong, state endorsement, the court acknowledged that '[s]pirituality is a central part of the Alcoholics Anonymous philosophy, and the program contains religious overtones.' [\[FN119\]](#) The court also recognized \*462 AA's monotheistic foundation, [\[FN120\]](#) and commented that although the "reference to Copr.God' and Copr.Higher Power' need not mean a deity, the association between the two is frequently made." [\[FN121\]](#) The court stated that the Twelve Steps were the "heart" of the AA program and that the AA meetings O'Connor attended commenced with a prayer and "closed with participants holding hands and reciting the Lord's Prayer." [\[FN122\]](#) A violation of the Establishment Clause, however, the court concluded, required more state involvement than the incorporation of the concept of God in a program in which the State encourages participation. [\[FN123\]](#) Central to the court's holding was that O'Connor, unlike Warner, was not compelled to attend AA in particular.

Significant to this Court's decision is that the individual has a choice over what program to attend. Rational Recovery is a viable, although less frequently offered, self-help program that does not use any concept of "spirituality" to treat alcohol-related problems. Moreover, individuals who do not want to attend either Alcoholics Anonymous or Rational Recovery may devise their own means of "self-help" and seek approval from the County. Given this array of options, it cannot be said that the State and County are endorsing the religious message of AA rather than promoting the concept of "self-help." [\[FN124\]](#)

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### C. Reconciling Warner III and O'Connor

Notwithstanding facial similarities, Warner III and O'Connor are factually distinct. Warner III concerned compulsory AA--i.e., the situation in which AA attendance is mandated by the state as a probationary condition with no allowance for nonreligious alternatives. O'Connor, on the other hand, was not a compulsory AA case. O'Connor's probationary conditions directed him to attend 'self-help' meetings, and AA was not the only available program. It is on precisely this ground--the probationer's freedom to choose to attend a nonreligious rehabilitation program--that Warner III and O'Connor can be reconciled and are mutually supportive. In Warner III, the court, citing O'Connor as supporting authority, stated that the case before it would have been altogether different if Warner had been granted a choice of self-help programs. [FN125] Likewise, the Warner II court, recognizing that its holding 'may be disruptive of the Department of Probation's legitimate and important efforts to rehabilitate \*463 those who have committed alcohol-related offenses,' suggested, also citing O'Connor as support, that offering probationers a choice between religious and nonreligious programs may cure Establishment Clause infirmities. [FN126] Therefore, both Warner decisions and O'Connor emphasize that choice between religious and nonreligious self-help groups is constitutionally significant in the context of probation.

Because coercion, for the most part, is either clearly present or clearly absent, [FN127] Warner and O'Connor represent cases that lend themselves to relatively swift resolution. Indeed these cases articulate a consistent constitutional theory regarding AA as a probationary condition. The three courts that reviewed these cases indicated that state-compelled AA attendance under threat of incarceration would represent a constitutional violation. [FN128] It is the facts of these cases, and not the law invoked by the presiding judges, that compelled contrary results: Warner's probationary conditions presented him with no alternatives to AA whereas O'Connor's did. In other words, because O'Connor had a choice between secular and nonsecular support programs, and because Warner's only choice was between AA and incarceration, Warner's attendance at AA was compulsory whereas O'Connor's was not.

\*464 What is most interesting about these cases are the critical questions they leave unanswered. Return now to the hypothetical scenario introduced at the beginning of this Note. What happens when a facially open-ended probationary condition leaves no practicable secular alternative to AA? Not all probationary AA cases that may arise will be as factually clear--and therefore as easy to resolve--as Warner and O'Connor. The absence of local, nonreligious self-help organizations may render facially neutral conditions de facto compulsory AA. This is the challenge that judges in jurisdictions throughout the country are likely to face in the future.

## III. Toward Synthesis: What Conditions Amount to Compulsion?

This Part addresses the question raised by Part II.C: What conditions amount to compulsory AA? This Part first addresses the case of facial compulsion, concluding that such a directive is always invalid. It then examines the more complex situation of the facially neutral condition amounting to a de facto AA participation requirement and presents a nonexhaustive list of factors that may be constitutionally relevant in cases factually situated somewhere between Warner and O'Connor. Finally, it evaluates a provision recently amended by the California Department of Alcohol and Drug Programs that prudently addresses the constitutional problems raised by cases such as Warner and O'Connor.

### A. Facial Compulsion: Warner Revisited

Because AA meetings constitute religious exercise for Establishment Clause purposes, any probationary condition expressly requiring AA attendance violates the Establishment Clause. When Robert Warner objected to a probationary condition compelling him to attend AA, the Second Circuit in Warner III affirmed the district court's holding that the contested condition violated the Establishment Clause because 'sending Warner to A.A. as a condition of his probation, without offering a choice of other providers, plainly constituted coerced participation in a religious exercise.' [FN129]

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Even where a probationer prefers to attend AA and therefore does not contest a probationary condition explicitly mandating only AA attendance, a court should still find a violation of the Establishment Clause because the Establishment Clause, unlike the Free Exercise Clause, places obligations on government even when no particular individual's rights are violated. [\[FN130\]](#) As the Second Circuit's holding in *Warner III* indicates, <sup>\*465</sup> however, where a probationer is given a meaningful choice between religious and nonreligious self-help groups, there is no Establishment Clause violation, regardless of whether the probationer attends AA, because it is the probationer that has made the choice.

## B. De Facto Compulsory Alcoholics Anonymous

Even facially neutral probationary conditions may run afoul of the Establishment Clause as applied where probationers are left with no practical alternatives to AA or jail. The formal availability of secular alternatives that are too remote, too expensive, or insufficiently available to provide the probationer with a bona fide choice will not cure the constitutional defect of compulsory AA. This section catalogues factors that judges might weigh in determining the genuineness of AA alternatives.

1. Exclusivity.--A seemingly simple solution to the problem of compulsory AA is to direct probationers to attend unspecified self-help groups, on the expectation that those who object to AA will find an effective, secular alternative. [\[FN131\]](#) Whether such an open-ended solution will prove satisfactory, however, is contingent on the existence of nonsectarian support group alternatives--i.e., whether the probationer truly has a choice between religious and nonreligious programs. Notwithstanding the existence of various secular alcohol support groups such as Rational Recovery and Secular Organization for Sobriety, these programs are not nearly as prevalent as AA. [\[FN132\]](#) Because AA may well be the only self-help group available in certain geographic locations, [\[FN133\]](#) a probationary condition ordering the probationer to attend an unspecified self-help group, although facially neutral, may amount to de facto compulsory AA. Combining the rationales of *Warner* and *O'Connor*, this seemingly neutral provision would still violate the Establishment Clause. After all, if the issue is choice whether to participate, such choice must be meaningful, not merely nominal. [\[FN134\]](#)

<sup>\*466</sup> 2. Locality and Proximity.--Locality and proximity are factors closely related to exclusivity. Locality refers to a probationer's or self-help group's particular geographic location (e.g., city, county, state), whereas proximity refers to the distance between the probationer and the self-help program. As just noted, AA may be the only self-help group available in certain locations. A question may therefore arise as to the permissible limits on proximity. For example, is it permissible to mandate self-help group attendance where AA is the only available program in the probationer's county of residence, but a nonreligious alternative is located in the adjacent county? Then again, is the county line--or similar designation--the proper measurement for determining whether the condition is permissible? Depending on the county's size and the probationer's location within the county, a trip to a neighboring county could be a significantly shorter distance than an intracounty trip. Therefore, actual distance, too, must be an important part of the calculus. The question that must be asked is at what point can it be said that a probationer is being compelled to attend AA because the nonreligious alternative is located too far away. At a minimum, a secular alternative not readily reachable by any regular and available means of transportation could not qualify as a bona fide choice sufficient to answer the charge of impermissible compulsion.

3. Cost.--Similar problems may arise where the probationer is offered a choice between religiously and nonreligiously oriented support groups but the secular programs carry a fee while AA is free. As the court stated in *Warner I*, "there may be a problem even after alternative treatment programs are provided if the alternative programs were provided at some higher financial cost." [\[FN135\]](#) Not only the cost of the program, but the ability of the probationer to pay, might figure in judicial determination of the genuineness of the secular alternative. Situations where the cost of avoiding jail or religious practice would seriously burden the probationer financially, or where this cost was otherwise exceptional in relation to the <sup>\*467</sup> probationer's resources, might persuade reviewing courts that the requirement of real choice has not been met.

4. Frequency of Meetings.--Imagine another example. A probationer is given the choice between one religious and one nonreligious support program, both of which are free and equidistant. The religious support group, however, offers

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twenty meetings at various times per week, whereas the nonreligious organization only convenes five times per week. Because the probationer's schedule does not always permit her to attend the nonreligious program, she must sometimes attend the religiously affiliated program to remain in compliance with her probationary conditions. Does this amount to forbidden state coercion? This scenario roughly presents the facts of O'Connor. In O'Connor, only five Rational Recovery meetings were offered per week whereas AA meetings 'were offered much more frequently.' [\[FN136\]](#) O'Connor claimed that his schedule prohibited him from always attending Rational Recovery meetings, so he attended AA half of the time, and Rational Recovery the other half. [\[FN137\]](#) The O'Connor court stated that Rational Recovery was a 'viable, although less frequently offered, self-help program' and found no Establishment Clause violation. [\[FN138\]](#) O'Connor, however, did not claim that he was coerced to attend AA. [\[FN139\]](#) Would the decision have been different if O'Connor alleged that the state coerced him to attend AA because of the infrequency of Rational Recovery meetings? Would the decision have been different if only one Rational Recovery meeting occurred per week? And what result follows where a limited schedule of alternative meetings conflicts with a probationer's other core commitments, such as work or childcare?

These questions admit of no easy answers. Determining whether, in practice, a facially neutral or inclusive sentence confers sufficient choice upon the probationer to foreclose a coercion claim will be in every instance a fact specific enterprise. Moreover, the variables that inform the real availability of alternatives to AA are likely to appear in combination, rendering the judge's balancing task more difficult still. What these examples do show is that under current precedent, considerations other than choice between religious and nonreligious support programs may be relevant to determining whether a probationary condition amounts to compulsion to attend religious exercise in violation of the Establishment Clause; and that granting the probationer a merely formal choice between religious and nonreligious support programs may be an insufficient defense to a coercion-based Establishment Clause claim.

#### \*468 C. A Model Solution

In response to O'Connor, and to comply with the Establishment Clause, [\[FN140\]](#) in 1995 the California Department of Alcohol and Drug Programs amended California Administrative Code section 9860 governing the county's additional drinking and driving program requirements. [\[FN141\]](#) The 1992 version of section 9860, which was in effect at the time of O'Connor's conviction, stated little more than 'the drinking driver program shall ensure that a variety of options are available which take into account the unique needs of each participant.' [\[FN142\]](#) Section 9860 is now significantly more detailed and explicitly states how this goal is to be accomplished. Under the amended version of section 9860, the county, if it chooses to mandate participation in a self-help program as an additional county requirement, must develop a list of self-help groups that the probationer may attend. [\[FN143\]](#) Notably, the new section explicitly categorizes AA as a sectarian organization and requires the county to list nonsectarian self-help groups if it lists sectarian groups such as AA. [\[FN144\]](#) In the event that the only self-help groups available in the county are sectarian, or if nonsectarian groups are not available or accessible to the probationer, the county must select a different additional program requirement. [\[FN145\]](#) Furthermore the new code section states:

\*469 The county shall not require the [self-help organization] to require the participant to read, watch, or listen to material about or provided by a self-help group if the participant informs the [self-help organization] that he/she disagrees with sectarian principles advocated by the self-help group. The county shall require the [self-help organization] to allow the participant to complete an alternate activity from the list of [ approved activities]. [\[FN146\]](#)

Although section 9860 pertains only to the implementation of self-help groups at the county level, similar provisions could be incorporated into any state's scheme for implementing support group attendance. Section 9860 provides a framework for resolving the compulsory AA issues that have arisen to date, as well as for preempting many of the foreseeable claims that have yet to be raised. First, the section appropriately recognizes AA as a sectarian organization. [\[FN147\]](#) In addition to preventing unnecessary litigation over this issue, this acknowledgment eliminates any ignorance about AA's rehabilitative approach. [\[FN148\]](#) Second, section 9860 protects the county from violating the Establishment Clause by requiring the county to develop a list of the available self-help groups that includes nonsectarian alternatives in the event that sectarian programs are listed, and by forbidding support group attendance as an additional county requirement (regardless of probationer desire) where the only support groups available in the county are sectarian.

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[\[FN149\]](#)

Section 9860 also appears to anticipate and foreclose otherwise potential coercion-based Establishment Clause claims. First, regarding cost, subsection 9860(j) states that if there are any costs associated with the \*470 additional county requirements, such costs 'shall be included in the program fee approved in accordance with Section 9878.' [\[FN150\]](#) The Department of Alcohol and Drug Programs added this provision to 'prevent programs from charging participants an additional fee for completing additional requirements mandated by the county' and 'so that participants would not be forced, due to financial considerations, to attend meetings of a self help group if they objected to the principles advocated by the self help group.' [\[FN151\]](#) Section 9878 sets out a detailed system for calculating a participant's program fees. The program is required to 'establish and use a standardized payment schedule . . . to determine each participant's assessed program fee and schedule for payment of fees.' [\[FN152\]](#) Furthermore, sections 9878 and 9879 establish a mechanism for performing financial assessments of program participants who notify the program that they are unable to pay the fees shown on the standardized payment schedule. [\[FN153\]](#) The program is prohibited from denying services to a participant who, based on the results of the financial assessment, is unable to pay the full program fee. [\[FN154\]](#)

Second, subsection 9860(c)(2)(B) states that support group attendance is not permitted as an additional county requirement where '[n]onsectarian groups are not available or accessible' to the probationer. [\[FN155\]](#) Unlike subsection 9860(c)(2)(A), this subsection does not contain \*471 the limiting language 'in the county.' [\[FN156\]](#) The clear command of the provision, then, is that at a minimum, nonreligious self-help group meetings must be available or accessible to the probationer in order for a county to mandate such participation as an additional county requirement.

The difficult task, of course, is determining the legal bounds of availability and accessibility. The terms 'available' and 'accessible' are defined neither in section 9860 nor in the governing definition provision. [\[FN157\]](#) Therefore, the county is initially charged with deciding whether an alternative is so inconvenient or impracticable, so as to violate the requirement of subsection 9860(c)(2)(B). Counties facing this problem might be expected to draw on the factors adduced in Part III.B above to strike the proper balance. If self-help group attendance is imposed and subsequently challenged, it will fall to reviewing courts to decide whether the requirements of subsection 9860(c)(2)(B) have been met, as well as to determine whether there has been a violation of the Establishment Clause. Judges facing these issues might also be expected to draw on the factors presented in Part III.B. Thus, while provisions such as section 9860 anticipate many of the claims that are likely to arise as support group conditions are imposed and challenged throughout the country, the fact-sensitive inquiry outlined in this Note will still ultimately be required.

### Conclusion

AA is unquestionably the foremost self-help program for alcoholics, and as such is routinely imposed as a probationary condition for DWI offenders. Because it is mandated by the state and because of AA's religious character, courts generally agree that compulsory AA as a condition of probation violates the Establishment Clause. The issue of what other circumstances--besides a facial directive to attend AA--amount to compulsory AA, however, has yet to be examined judicially. To protect probationers' constitutional rights, as well as to avoid future litigation and potential liability, state authorities should adopt provisions similar to California's mechanical procedure for determining the permissibility of self-help group attendance. Whether or not under statutory or administrative directive, however, judges, probation departments, and any other state authority charged with determining probationary conditions, as well as judges reviewing challenges to probationary conditions, must, in light of legal precedent, be attuned to factors such as those identified in this Note that may render an apparently optional probationary condition a de \*472 facto requirement to attend AA, thereby offending the Establishment Clause.

[\[FN1\]](#). As used throughout this Note, the abbreviation DWI represents the crime of driving while intoxicated or driving under the influence (DUI) of alcohol.

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[FN2]. See Theodore A. Bruce & Patricia R. Bruce, *The Legislative Response to the Drunk Driving Dilemma: An Empirical Analysis of Its Success and Failure*, 33 St. Louis U. L.J. 177, 177 (1988). Since the states' crackdown on drunk driving, the number of people arrested for DWI violations has decreased. In 1983, 1,613,184 DWI arrests were made, compared with the 1,079,533 made in 1994. Compare Federal Bureau of Investigation, U.S. Dep't of Justice, *Crime in the United States: Uniform Crime Reports* 1983, at 172 (1984) with Federal Bureau of Investigation, U.S. Dep't of Justice, *Crime in the United States: Uniform Crime Reports* 1994, at 220 (1995). Despite this trend of decreasing DWI arrests, the number of people continuing to commit DWI offenses remains significant enough to warrant further public and legislative attention. See Federal Bureau of Investigation, U.S. Dep't of Justice, *Crime in the United States: Uniform Crime Reports* 1995, at 211 (1996) (indicating that 1,033,280 DWI arrests were made in 1995).

[FN3]. See American Ins. Ass'n, *Digest of State Laws Relating to Driving Under the Influence of Drugs or Alcohol* passim (1988) (cataloguing state provisions governing DWI rehabilitation); National Highway Traffic Safety Admin., U.S. Dep't of Transp., *Digest of State Alcohol-Highway Safety Related Legislation* passim (14th ed. 1996) (same); National Survey of State Laws 105- 21 (Richard A. Leiter ed., 2d ed. 1997) (same).

[FN4]. See American Ins. Ass'n, *supra* note 3, passim; National Highway Traffic Safety Admin., *supra* note 3, passim; National Survey of State Laws, *supra* note 3, at 105-21.

[FN5]. See American Ins. Ass'n, *supra* note 3, passim; National Highway Traffic Safety Admin., *supra* note 3, passim; National Survey of State Laws, *supra* note 3, at 105-21.

[FN6]. See *infra* note 20 for the text of these prayers.

[FN7]. See Alcoholics Anonymous World Servs., Inc., *Alcoholics Anonymous* 59- 60 (3d ed. 1976) [hereinafter *Big Book*] (This text is popularly referred to as the 'Big Book' and for clarity's sake will be referred to as such throughout this Note.). See generally *infra* Part I.A.

[FN8]. In the United States in 1995, of the 3,090,626 people comprising the probation population, 17% (i.e., approximately 525,000) were DWI offenders. See Bureau of Justice Statistics, U.S. Dep't of Justice, Press Release, *Probation and Parole Population Reaches Almost 3.8 Million*, June 30, 1996, at 8 (on file with the Columbia Law Review). In 1995, in New York State alone, more than 32,000 DWI offenders were on probation. See New York State Div. of Probation and Correctional Alternatives, *1995 Annual Report* 16 (1996) (on file with the Columbia Law Review). This is the greatest number of such cases since 1981. See *id.* Although extensive research failed to reveal statistics tracking the frequency with which AA is made a condition of probation, because AA is the preeminent self-help group for alcoholics, there is a high probability of it being specifically imposed. See *infra* note 10 and accompanying text (discussing AA membership statistics); cf. B. Drummond Ayres Jr., *Atheist Challenges Order to Attend A.A. Meetings*, N.Y. Times, July 11, 1988, at A12 ("Copr. We've been cooperating with courts on alcohol cases for more than 35 years in at least three-fourths of the states." (quoting AA spokesperson at New York headquarters)).

AA is also imposed as a probationary condition for persons convicted of domestic violence offenses. See, e.g., *Courts*, Portland Press Herald, Mar. 6, 1996, at 6B (man convicted of two charges of assault placed on one year probation, conditions of which require his attendance at AA meetings and domestic violence counseling); *Daughter Threat*, City News Service of L.A., Inc., May 20, 1996, available in LEXIS, News Library, Curnws File (father who repeatedly threatened to kill his daughter placed on three years summary probation, conditions of which require him to attend 104 AA meetings and undergo one year of domestic violence counseling). Although this Note examines AA participation only as a probationary condition for DWI offenses, its analysis is equally applicable to domestic violence cases, as well

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as to any other instance where AA, or any religiously oriented rehabilitative program, is made a condition of probation.

[FN9]. The Establishment Clause provides that: 'Congress shall make no law respecting an establishment of religion.' U.S. Const. amend. I. Several federal courts have recently addressed whether compelled AA participation in fulfillment of DWI probationary conditions violates the Establishment Clause. See, e.g., *Warner v. Orange County Dep't of Probation* (Warner III), No. 95-7055, 1996 U.S. App. LEXIS 23432, at \*26 \*34 (2d Cir. Sept. 9, 1996), petition for reh'g filed, (Sept. 25, 1996); *Warner v. Orange County Dep't of Probation* (Warner II), 870 F. Supp. 69, 72-73 (S.D.N.Y. 1994), aff'd, No. 95-7055, 1996 U.S. App. LEXIS 23432 (2d Cir. Sept. 9, 1996), petition for reh'g filed, (Sept. 25, 1996); *O'Connor v. California*, 855 F. Supp. 303, 306-08 (C.D. Cal. 1994); *Warner v. Orange County Dep't of Probation* (Warner I), 827 F. Supp. 261, 264-69 (S.D.N.Y. 1993). Several courts have also addressed the constitutionality of mandatory AA participation in a prison setting. See, e.g., *Kerr v. Farrey*, 95 F.3d 472, 476-80 (7th Cir. 1996); *Boyd v. Coughlin*, 914 F. Supp. 828, 831-33 (N.D.N.Y. 1996); *Griffin v. Coughlin*, 673 N.E.2d 98, 105-08 (N.Y. 1996), cert. denied, 117 S. Ct. 681 (1997). Because there is some question as to whether probation constitutes a prison policy, see, e.g., *Warner I*, 827 F. Supp. at 268, and because probationers 'retain a broader range of protected liberty interests than persons who are incarcerated,' Stacey L. Arthur, *The Norplant Prescription: Birth Control, Woman Control, or Crime Control?*, 40 *UCLA L. Rev.* 1, 60 (1992), whether forced AA participation violates an inmate's, as opposed to a probationer's, rights under the Establishment Clause is beyond the scope of this Note. See generally *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 349 (1987) (judging prison regulations alleged to infringe inmates' constitutional rights under a 'reasonableness' standard that is less strict than standard ordinarily applied to alleged violations of fundamental constitutional rights); *Turner v. Safley*, 482 U.S. 78, 89 (1987) (same); *Pell v. Procunier*, 417 U.S. 817, 822-23 (1974) (same). Even though cases regarding the constitutionality of AA participation in a prison setting are therefore distinguishable from cases pertaining to AA participation as a probationary condition, this distinction has no bearing on a court's determination of whether AA qualifies as a religious program for purposes of the Establishment Clause.

Although this Note only examines the constitutionality of AA participation in satisfaction of probationary requirements in light of the Establishment Clause, such requirements may also be unconstitutional on other grounds. For example, they may violate the First Amendment's Free Exercise Clause, which states that 'Congress shall make no law ... prohibiting the free exercise [of religion].' U.S. Const. amend. I. Additionally, a statutory Free Exercise challenge could be brought under the Religious Freedom Restoration Act of 1993, 42 U.S.C. ss 2000bb-2000bb-4 (1994), which renders invalid any governmental act that substantially burdens the exercise of religious belief unless that act is necessary to achieve a compelling interest and is the least restrictive means of furthering that interest.

Absent from the cases thus far examining AA participation as a probationary requirement is discussion of an additional potential ground for finding such requirements unconstitutional: the unconstitutional conditions doctrine. 'The doctrine of unconstitutional conditions holds that government may not grant a benefit on the condition that the beneficiary surrender a constitutional right, even if the government may withhold that benefit altogether.' Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 *Harv. L. Rev.* 1413, 1415 (1989). Applied to the AA requirement, an argument could be made that while a court is under no obligation to grant probation, if it chooses to do so, it cannot impose conditions that require the surrender of constitutional rights. Various commentators have applied this doctrine to analyze the constitutionality of certain probationary conditions. See, e.g., Tracy Ballard, *The Norplant Condition: One Step Forward or Two Steps Back?*, 16 *Harv. Women's L.J.* 139, 170-81 (1993) (analyzing compulsory contraception as probationary condition under unconstitutional conditions doctrine); Janet F. Ginzberg, Note, *Compulsory Contraception as a Condition of Probation: The Use and Abuse of Norplant*, 58 *Brook. L. Rev.* 979, 1014 (1992) (same); Christopher K. Smith, Note, *State Compelled Spiritual Revelation: The First Amendment and Alcoholics Anonymous as a Condition of Drunk Driving Probation*, 1 *Wm. & Mary Bill Rts. J.* 299, 308-10 (1992) (applying unconstitutional conditions doctrine to compulsory AA as probationary condition). Probationary conditions infringing constitutional rights, however, are not per se unconstitutional. See Ballard, *supra*, at 175-76; Jaimy M. Levine, Comment, 'Join the Sierra Club!': Imposition of Ideology as a Condition of Probation, 142 *U. Pa. L. Rev.* 1841, 1860-62 (1994).

[FN10]. Alcoholics Anonymous World Servs., Inc., Membership (visited Jan. 27, 1997) <<http://www.alcoholics-anonymous.org/factfile/doc07.html>> (on file with the Columbia Law Review). In the United States alone there are more than 50,000 AA groups serving over 1,100,000 members. See *id.* Over 2000 AA chapters throughout the United States

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and Canada are located within correctional facilities. See *id.* For the membership figures of secular alternatives to AA, see *infra* note 132 and accompanying text.

[FN11]. See *supra* note 7.

[FN12]. See Richard W. Thoreson & Frank C. Budd, Self-Help Groups and Other Group Procedures for Treating Alcohol Problems, in *Treatment and Prevention of Alcohol Problems: A Resource Manual* 157, 171 (W. Miles Cox ed., 1987).

[FN13]. Big Book, *supra* note 7, at xiv.

[FN14]. For an example of the Big Book's monotheistic approach, see *id.* at 62-63:

This is the how and why of it. First of all, we had to quit playing God. It didn't work. Next, we decided that hereafter in this drama of life, God was going to be our Director. He is the Principal; we are His agents. He is the Father, and we are His children. Most good ideas are simple, and this concept was the keystone of the new and triumphant arch through which we passed to freedom.

When we sincerely took such a position, all sorts of remarkable things followed. We had a new Employer. Being all powerful, He provided what we needed, if we kept close to Him and performed His work well. Established on such a footing we became less and less interested in ourselves, our little plans and designs. More and more we became interested in seeing what we could contribute to life. As we felt new power flow in, as we enjoyed peace of mind, as we discovered we could face life successfully, as we became conscious of His presence, we began to lose our fear of today, tomorrow or the hereafter. We were reborn.

[FN15]. See Thoreson & Budd, *supra* note 12, at 165. The basic doctrine of the Oxford Group is that '(1) though we have behaved badly, (2) we can change; (3) confession is a prerequisite to change; (4) the person so changed will have direct access to God; (5) the age of miracles has returned; and (6) those who have changed must change others.' *Id.* (citation omitted).

[FN16]. Big Book, *supra* note 7, at 564; see also Alcoholics Anonymous World Servs., Inc., Twelve Steps and Twelve Traditions 132-38 (1981) [hereinafter *Twelve Traditions*] (elaborating on the second Tradition).

[FN17]. See Thoreson & Budd, *supra* note 12, at 166-70.

[FN18]. Big Book, *supra* note 7, at 59-60.

[FN19]. See Stewart C., *A Reference Guide to the Big Book of Alcoholics Anonymous* app. at 115 (1986).

[FN20]. See Thoreson & Budd, *supra* note 12, at 166; see also [Warner v. Orange County Dep't of Probation \(Warner II\)](#), 870 F. Supp. 69, 71 (S.D.N.Y. 1994) (stating that AA meetings that plaintiff attended opened with the Serenity Prayer and closed with the Lord's Prayer), *aff'd*, No. 95-7055, 1996 U.S. App. LEXIS 23432 (2d Cir. Sept. 9, 1996), petition for reh'g filed, (Sept. 25, 1996).

The Lord's Prayer, commonly referred to as the Our Father, reads:

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Our Father in heaven, hallowed be your name, your kingdom come, your will be done on earth as it is in heaven. Give us today our daily bread, and forgive us the wrong we have done as we forgive those who wrong us. Subject us not to the trial but deliver us from the evil one.

Matthew 6:9-13.

The Serenity Prayer states: 'God grant me the serenity to accept the things that I cannot change, the courage to change the things I can, and the wisdom to know the difference.' See Thoreson & Budd, *supra* note 12, at 166 (citation omitted); see also [Warner II, 870 F. Supp. at 71](#); Big Book, *supra* note 7, at 382.

[FN21]. See Big Book, *supra* note 7, app. at 569. This section of the Big Book, entitled 'Spiritual Experience,' states:

The terms 'spiritual experience' and 'spiritual awakening' are used many times in this book which, upon careful reading, shows that the personality change sufficient to bring about recovery from alcoholism has manifested itself among us in many different forms.

Yet it is true that our first printing gave many readers the impression that these personality changes, or religious experiences, must be in the nature of sudden and spectacular upheavals. Happily for everyone, this conclusion is erroneous.

In the first few chapters a number of sudden revolutionary changes are described. Though it was not our intention to create such an impression, many alcoholics have nevertheless concluded that in order to recover they must acquire an immediate and overwhelming 'God-consciousness' followed at once by a vast change in feeling and outlook.

Among our rapidly growing membership of thousands of alcoholics such transformations, though frequent, are by no means the rule. Most of our experiences are what the psychologist William James calls the 'educational variety' because they develop slowly over a period of time. Quite often friends of the newcomer are aware of the difference long before he is himself. He finally realizes that he has undergone a profound alteration in his reaction to life; that such a change could hardly have been brought about by himself alone. What often takes place in a few months could seldom have been accomplished by years of self discipline. With few exceptions our members find that they have tapped an unsuspected inner resource which they presently identify with their own conception of a Power greater than themselves.

Most of us think this awareness of a Power greater than ourselves is the essence of spiritual experience. Our more religious members call it 'God-consciousness.'

Most emphatically we wish to say that any alcoholic capable of honestly facing his problems in the light of our experience can recover, provided he does not close his mind to all spiritual concepts. He can only be defeated by an attitude of intolerance or belligerent denial.

We find that no one need have difficulty with the spirituality of the program. Willingness, honesty and open mindedness are the essentials of recovery. But these are indispensable.

*Id.* app. at 569-70; see also Thoreson & Budd, *supra* note 12, at 165 (stating that although AA incorporates religion into its program of recovery it is not a religious program).

[FN22]. Twelve Traditions, *supra* note 16, at 26.

[FN23]. The Supreme Court, for purposes of the Free Exercise Clause, originally construed the word 'religion' to apply exclusively to theism. See [Reynolds v. United States, 98 U.S. 145, 162-66 \(1878\)](#) (defining religion in terms of belief in God); see also [Davis v. Beason, 133 U.S. 333, 342 \(1890\)](#) ('The term Copr.religion' has reference to one's views of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will.'). As religious beliefs throughout the United States diversified, the Court responded first by expanding its definition of religion to encompass nontheistic religions, see, e.g., [Torcaso v. Watkins, 367 U.S. 488, 495 \(1961\)](#) (stating that state and federal governments cannot 'constitutionally pass laws or impose requirements which aid ... those religions based on a belief in the existence of God as against those religions founded on different beliefs' (footnotes omitted)), and subsequently by broadening its definition yet again to include as religion a person's 'ultimate concern'--a 'belief that is sincere and meaningful [and that] occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God.' [United States v. Seeger, 380 U.S. 163, 166 \(1965\)](#); see also [Welsh v. United States, 398 U.S. 333, 339 \(1970\)](#) (explaining that under Seeger 'the central consideration in determining whether [a person's] beliefs are religious is

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whether these beliefs play the role of a religion and function as a religion in the [person's] life'). The term 'ultimate concern' is theologian Paul Tillich's. See [Seeger, 380 U.S. at 187](#) (quoting Paul Tillich, *The Shaking of the Foundations* 57 (1948)).

Although Seeger and Welsh pertained to the Court's interpretation of the conscientious objector exemption in the Universal Military Training and Service Act, concurring opinions in both decisions, as well as commentators in general, suggest that the definition of religion announced in Seeger and clarified in Welsh is a constitutional definition of religion. See, e.g., [Welsh, 398 U.S. at 344-45](#) (Harlan, J., concurring) (suggesting that the Court, to save statute from being declared unconstitutional, imposed on statute a constitutional definition of religion); [Seeger, 380 U.S. at 188](#) (Douglas, J., concurring) (same); Kent Greenawalt, *Religion as a Concept in Constitutional Law*, [72 Cal. L. Rev. 753, 760-61 \(1984\)](#) (noting that after Seeger and Welsh, various courts and scholars agree that constitutional definition of religion is very expansive). When, however, this 'ultimate concern' definition of religion--developed in the context of Free Exercise Clause jurisprudence--is applied to the Establishment Clause, it creates conflict between the two clauses. As one commentator has noted:

To borrow the ultimate concern test from the free exercise context and use it with present establishment clause doctrines would be to invite attack on all programs that further the ultimate concerns of individuals or entangle the government with such concerns. Doctrinal chaos might well result, and with it might come the wholesale invalidation of programs which, if analyzed in light of the values underlying the establishment clause, would be found benign.

Note, *Toward a Constitutional Definition of Religion*, [91 Harv. L. Rev. 1056, 1084 \(1978\)](#); see also Laurence H. Tribe, *American Constitutional Law* s 14-6, at 1183-88 (2d ed. 1988) (discussing tension that arises between the Free Exercise and Establishment Clauses as definition of religion is broadened). In an effort to reconcile this conflict, commentators have proposed that 'religion' for Free Exercise purposes be defined more broadly than 'religion' in the Establishment Clause context. See, e.g., Note, *supra*, at 1084-86; see also [United States v. Allen, 760 F.2d 447, 450-51 \(2d Cir. 1985\)](#) (applying bifurcated definition of religion); [Grove v. Mead Sch. Dist. No. 354, 753 F.2d 1528, 1537 \(9th Cir. 1985\)](#) (Canby, J., concurring) (endorsing bifurcated definition of religion). But see [Everson v. Board of Educ., 330 U.S. 1, 32 \(1947\)](#) (Rutledge, J., dissenting). As Justice Rutledge noted:

Copr.Religion' appears only once in the [First] Amendment. But the word governs two prohibitions and governs them alike. It does not have two meanings, one narrow to forbid Copr.an establishment' and another, much broader, for securing Copr.the free exercise thereof.' Copr.Thereof' brings down Copr.religion' with its entire and exact content .... Id. Additional proposals include substantive, functional, and analogical definitions of religion. See [Dmitry N. Feofanov, Defining Religion: An Immodest Proposal, 23 Hofstra L. Rev. 309, 337-43 \(1994\)](#) (discussing various definitions of religion). 'A functional definition avoids inquiring into the content of belief, concerning itself only with the function of beliefs in a person's life, whereas a substantive definition concerns itself with the belief's substance.' Id. at 339. Under the analogical approach, 'religion should be determined by the closeness of analogy in the relevant respects between the disputed instance and what is indisputably religion.' Greenawalt, *supra*, at 762.

[FN24]. Greenawalt, *supra* note 23, at 753.

[FN25]. Cf. [Fleischfresser v. Directors of Sch. Dist. 200, 15 F.3d 680, 687 \(7th Cir. 1994\)](#) (noting that there is much less tension between the Free Exercise and Establishment Clauses 'when referring to the recitation of the Lord's Prayer, readings from the Bible, and the distribution of Gideon Bibles, i.e. when Copr.traditional religions' are at issue').

[FN26]. See, e.g., [Kerr v. Farrey, 95 F.3d 472, 479-80 \(7th Cir. 1996\)](#) ('A straightforward reading of the twelve steps shows clearly that the steps are based on the monotheistic idea of a single God or Supreme Being. '); *Warner v. Orange County Dep't of Probation* (Warner III), No. 95-7055, 1996 U.S. App. LEXIS 23432, at \*27 (2d Cir. Sept. 9, 1996) (labelling AA meetings as 'intensely religious events'), petition for reh'g filed, (Sept. 25, 1996); [Warner v. Orange County Dep't of Probation \(Warner II\), 870 F. Supp. 69, 72 \(S.D.N.Y. 1994\)](#) (concluding that AA meetings were functional equivalent of religious exercise and should be treated as such under the Establishment Clause), *aff'd*, No. 95-7055, 1996 U.S. App. LEXIS 23432 (2d Cir. Sept. 9, 1996), petition for reh'g filed, (Sept. 25, 1996); [Scarpino v. Grossheim, 852 F. Supp. 798, 804 & n.5 \(S.D. Iowa 1994\)](#) (criticizing court's conclusion in [Stafford v. Harrison, 766 F. Supp. 1014 \(D.](#)

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[Kan. 1991](#)), that AA is not religious); [Warner v. Orange County Dep't of Probation \(Warner I\)](#), 827 F. Supp. 261, 266-67 (S.D.N.Y. 1993) (refusing to hold as matter of law that AA is not religious); [Griffin v. Coughlin](#), 673 N.E.2d 98, 103 (N.Y. 1996) (stating that AA methodology 'constitute[s], as a matter of law, religious exercise for Establishment Clause purposes'), cert. denied, 117 S. Ct. 681 (1997); cf. [O'Connor v. California](#), 855 F. Supp. 303, 307-08 (C.D. Cal. 1994) (discussing religious nature of AA despite conclusion that AA was not a 'religion').

A handful of lower courts have concluded that AA does not qualify as a religious organization for purposes of the Establishment Clause. See, e.g., [Boyd v. Coughlin](#), 914 F. Supp. 828, 833 (N.D.N.Y. 1996) (concluding that AA is spiritual and not religious); [Jones v. Smid](#), No. 4-89-CV-20857, 1993 WL 719562, at 4, 6 (S.D. Iowa Apr. 29, 1993) (relying on [Stafford](#) to conclude that program patterned after AA was spiritual and not religious); [Stafford](#), 766 F. Supp. at 1016-17 (concluding that AA is spiritual and not religious); [Griffin v. Coughlin](#), 626 N.Y.S.2d 1011, 1015 (App. Div. 1995) (finding that program modeled after AA was not religious), rev'd, 673 N.E.2d 98 (N.Y. 1996), cert. denied, 117 S. Ct. 681 (1997). These decisions, however, have been rebuked, directly or indirectly, both on appellate review and by other courts considering similar factual circumstances. See, e.g., [Warner III](#), 1996 U.S. App. LEXIS 23432, at \*27, \*33 n.10 (finding AA program of recovery to be religious and criticizing [Stafford](#) court's contrary finding); [Scarpino](#), 852 F. Supp. at 804 & n.5 (same); [Warner I](#), 827 F. Supp. at 267 (criticizing court's analysis in [Stafford](#)).

[FN27]. See *supra* note 23.

[FN28]. See *supra* text accompanying note 18 for the text of the Twelve Steps.

[FN29]. [Smith](#), *supra* note 9, at 304 & n.51 (citing [Meek v. Pittenger](#), 421 U.S. 349 (1975); [Levitt v. Committee for Pub. Educ. & Religious Liberty](#), 413 U.S. 472 (1973)). Likewise, in [Stone v. Graham](#), the Supreme Court stated that 'an Copr. avowed' secular purpose is not sufficient to avoid conflict with the First Amendment.' 449 U.S. 39, 41 (1980) (per curiam). Therefore, the courts that based their conclusion that AA is spiritual and not religious on AA's self-description alone were in error. See *supra* note 26 (listing cases criticizing courts accepting AA's distinction between the spiritual and the religious).

[FN30]. [Tribe](#), *supra* note 23, s 14-6, at 1187; see also [Greenawalt](#), *supra* note 23, at 753 (suggesting that courts should decide whether a practice is religious by comparing it with the 'indisputably' religious).

[FN31]. [Tribe](#), *supra* note 23, s 14-6 at 1187; see also [Wallace v. Jaffree](#), 472 U.S. 38, 58-61 (1985) (holding unconstitutional under the Establishment Clause state moment-of-silence statute including the word 'prayer'); [Jaffree v. Wallace](#), 705 F.2d 1526, 1534 (11th Cir. 1983) (noting that 'prayer is the quintessential religious practice'), aff'd, 472 U.S. 38 (1985).

[FN32]. 673 N.E.2d 98, 103 (N.Y. 1996), cert. denied, 117 S. Ct. 681 (1997).

[FN33]. *Id.* at 100 (footnote omitted). While the distinction between prison inmates and probationers may be constitutionally significant in evaluating AA participation, this distinction has no bearing on the analysis of the religiousness of AA. See *supra* note 9 (discussing distinction between inmates and probationers).

[FN34]. [Griffin](#), 673 N.E.2d at 102-03 (second and fourth alteration in original) (citations and footnote omitted).

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[FN35]. See supra note 26 and accompanying text.

[FN36]. It has been asserted that the degree to which individual chapters of AA rely on religious principles varies. For example, in *Warner v. Orange County Department of Probation* (Warner I), the court responded to the Department of Probation's claim that 'each chapter of AA is operated independently and that some do not rely heavily on religious practices,' by stating that if 'this is indeed true, the direct holding in this case may apply only to the specific chapter attended by Plaintiff and not to AA as a national organization.' [827 F. Supp. 261, 267 \(S.D.N.Y. 1993\)](#); see also [Boyd v. Coughlin, 914 F. Supp. 828, 832 \(N.D.N.Y. 1996\)](#) (distinguishing Warner I on this basis). Because the Twelve Steps and Twelve Traditions are the foundation of AA, however, the merit of these distinctions is questionable. Cf. Smith, supra note 9, at 304 n.44 ('Although each AA group enjoys significant autonomy, the guaranteed program consistencies include admission of powerlessness and turning to a higher being for a spiritual solution.' (citing Thoreson & Budd, supra note 12, at 167)).

[FN37]. See, e.g., [Roberts v. United States, 320 U.S. 264, 272 \(1943\)](#) (noting that purpose of probation is rehabilitation); [Higdon v. United States, 627 F.2d 893, 897 \(9th Cir. 1980\)](#) ("The primary purpose of probation is to rehabilitate the offender.").

[FN38]. See Levine, supra note 9, at 1852.

[FN39]. See Ginzberg, supra note 9, at 986 87 & n.34 (cataloguing state provisions governing probationary conditions).

[FN40]. See Smith, supra note 9, at 307.

[FN41]. Id. at 306 (footnote omitted).

[FN42]. See id.

[FN43]. See id. Judges sentencing DWI offenders to probation under grant of broad discretion over probation conditions also greatly rely on the expertise of the probation department when selecting alcohol therapy providers. See, e.g., *Warner v. Orange County Dep't of Probation* (Warner III), No. 95-7055, 1996 U.S. App. LEXIS 23432, at \*13 & n.3 (2d Cir. Sept. 9, 1996), petition for reh'g filed, (Sept. 25, 1996).

[FN44]. See Smith, supra note 9, at 307.

[FN45]. [U.S. Const. amend. I.](#)

[FN46]. [403 U.S. 602 \(1971\).](#)

[FN47]. [505 U.S. 577 \(1992\).](#) The other two Establishment Clause tests are the 'history and tradition' test adopted by the Court in [Marsh v. Chambers, 463 U.S. 783, 786 \(1983\)](#) (upholding state legislature's custom of opening each of its

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sessions with Judeo-Christian prayer because such practices are "deeply embedded in the history and tradition" of the United States), and the endorsement test announced in [County of Allegheny v. ACLU](#), 492 U.S. 573 (1989) (holding that creche displayed on property of county courthouse violated the Establishment Clause). These tests are simply inapplicable in the context of determining the constitutionality of AA as a probationary condition. The Marsh history and tradition test is inappropriate because AA as a condition of probation is not a practice that is deeply rooted in the history and tradition of the United States. Likewise, the endorsement test is inapplicable because it appears reserved for determining the constitutionality of government sponsorship of public religious displays. See, e.g., [Smith v. County of Albemarle](#), 895 F.2d 953, 958 (4th Cir. 1990) (holding that nativity scene constructed by private group on front lawn of county office building violated the Establishment Clause); [ACLU v. City of Birmingham](#), 791 F.2d 1561, 1566-67 (6th Cir. 1986) (applying endorsement test in holding that display of creche on lawn of city hall was unconstitutional); see also Kent Greenawalt, *Quo Vadis: The Status and Prospects of "Tests" Under the Religion Clauses*, 1995 *Sup. Ct. Rev.* 323, 373 (stating that endorsement test "arose and has been most securely rooted" in public symbolic speech cases); The Supreme Court, 1994 Term--Leading Cases, 109 *Harv. L. Rev.* 111, 178 n.72 (stating that search of Westlaw on Oct. 2, 1995 for decisions citing *County of Allegheny* generated 25 state appellate and federal cases pertaining to religious displays on government property).

[FN48]. See Greenawalt, *supra* note 47, at 323-24.

[FN49]. See [Lemon](#), 403 U.S. at 607, 609.

[FN50]. *Id.* at 612.

[FN51]. *Id.* at 612-13 (quoting [Walz v. Tax Comm'n](#), 397 U.S. 664, 674 (1970)).

[FN52]. See *id.* at 615.

[FN53]. See, e.g., [Lamb's Chapel v. Center Moriches Union Free Sch. Dist.](#), 508 U.S. 384, 397-400 (1993) (Scalia, J., concurring); [Aguilar v. Felton](#), 473 U.S. 402, 426-30 (1985) (O'Connor, J., dissenting); [Wallace v. Jaffree](#), 472 U.S. 38, 108-12 (1985) (Rehnquist, J., dissenting); see also William P. Marshall, 'We Know It When We See It': The Supreme Court and Establishment, 59 *S. Cal. L. Rev.* 495, 497 (1986) (noting that *Lemon*'s ambiguity has caused the Supreme Court's Establishment Clause jurisprudence to be 'universally criticized'); Michael Stokes Paulsen, *Lemon Is Dead*, 43 *Case W. Res. L. Rev.* 795, 801 (1993) (stating that 'the ambiguity of the [*Lemon*] test left the Court leeway to interpret each prong in varying ways, producing a bewildering patchwork of decisions').

[FN54]. In *Lamb's Chapel*, Justice White, writing for the majority, reminded the Court that *Lemon* had not been expressly overruled. See [Lamb's Chapel](#), 508 U.S. at 395 & n.7. Nevertheless, in [Rosenberger v. Rector and Visitors of the University of Virginia](#), 115 S. Ct. 2510 (1995), and [Capitol Square Review and Advisory Board v. Pinette](#), 115 S. Ct. 2440 (1995), two Establishment Clause cases decided at the end of the 1994 Term, none of the Justices relied on *Lemon* for their conclusions. See also [Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet](#), 512 U.S. 687, 750-51 (1994) (Scalia, J., dissenting) (stating that the majority 'snub[bed]' *Lemon* by only referencing it twice and in both instances only in 'see also' citations). According to one scholar, '[s]even members of the present Court [i.e., Chief Justice Rehnquist and Justices O'Connor, Scalia, Kennedy, Souter, Thomas, and Breyer] have now dissociated themselves from the *Lemon* test ... [and] [a]lthough the *Lemon* test has yet to be decisively rejected in a [sic] opinion of the Court, no Justice is likely to come forward and try to revive it.' Greenawalt, *supra* note 47, at 328.

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[FN55]. [505 U.S. 577 \(1992\)](#). Although the tests announced in *Lemon*, *Marsh*, *County of Allegheny*, and *Lee* are the only four Establishment Clause tests that have garnered majority support, Justice O'Connor's recent proposal for context-specific Establishment Clause tests appears to be gaining favor. Justice O'Connor used her concurring opinion in [Kiryas Joel, 512 U.S. at 718-21](#) (O'Connor, J., concurring in part and concurring in the judgment), primarily to propose to the Court that it adopt a context-specific Establishment Clause jurisprudence. Justice O'Connor again advocated this proposal in [Rosenberger, 115 S. Ct. at 2528](#) (O'Connor, J., concurring), and *Pinette*, [115 S. Ct. at 2454](#) (O'Connor, J., concurring in part and concurring in the judgment). Justice O'Connor appears to have persuaded two of her colleagues of the merits of a context-specific Establishment Clause jurisprudence. In *Pinette*, Justices Souter and Breyer joined Justice O'Connor's concurring opinion stating that 'the Establishment Clause inquiry cannot be distilled into a fixed, per se rule.' [Pinette, 115 S. Ct. at 2454](#) (O'Connor, J., joined by Souter and Breyer, JJ., concurring in part and concurring in the judgment). See Greenawalt, *supra* note 47, at 328 (describing as "[s]ignificant[ ]" fact that Justices Souter and Breyer joined in Justice O'Connor's opinion).

[FN56]. [Lee, 505 U.S. at 587](#); see also [County of Allegheny v. ACLU, 492 U.S. 573, 660 \(1989\)](#) (Kennedy, J., concurring in the judgment in part and dissenting in part) ('It is no surprise that without exception we have invalidated actions that further the interests of religion through the coercive power of government. Forbidden involvements include compelling or coercing participation or attendance at a religious activity ....' (citations omitted)).

Although the coercion test was officially adopted in *Lee*, its language was borrowed from precedent. See [County of Allegheny, 492 U.S. at 659](#) (Kennedy, J., concurring in the judgment in part and dissenting in part) (stating that 'government may not coerce anyone to support or participate in any religion or its exercise'). The Court's earliest exposition on coercion and the Establishment Clause is found in [Everson v. Board of Education, 330 U.S. 1 \(1947\)](#), the first case applying the Establishment Clause to the States, wherein Justice Black, writing for the majority, stated:

The Copr.establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non- attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa.

*Id.* at 15-16.

[FN57]. See [Lee, 505 U.S. at 586-87](#).

[FN58]. See *id.* Although the school district did not require attendance at the ceremony as a condition of graduation, the Court found attendance was "in a fair and real sense obligatory." [Id. at 586](#); see also [id. at 594-95](#) (stating that argument that attending graduation is voluntary is extremely formalistic).

[FN59]. See [id. at 593](#) ("We do not address whether [the choice of participating or protesting] is acceptable if the affected citizens are mature adults, but we think the State may not, consistent with the Establishment Clause, place primary and secondary school children in this position.").

[FN60]. *Id.*

[FN61]. *Id.*

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[FN62]. See *id.* at 636-39 (Scalia, J., dissenting).

[FN63]. *Id.* at 642 (quoting *id.* at 587 (opinion of the Court)).

[FN64]. *Id.* at 640; see also *id.* at 642 (defining legal coercion as threat of penalty).

[FN65]. See *supra* note 9 (explaining that inmates' constitutional rights are subject to different standards than those of probationers).

[FN66]. See No. 95-7055, 1996 U.S. App. LEXIS 23432 (2d Cir. Sept. 9, 1996), petition for reh'g filed, (Sept. 25, 1996).

[FN67]. 855 F. Supp. 303, 304 (C.D. Cal. 1994).

[FN68]. See Warner v. Orange County Dep't of Probation (Warner I), 827 F. Supp. 261, 262 (S.D.N.Y. 1993).

[FN69]. *Id.*

[FN70]. 42 U.S.C. s 1983 (1994).

[FN71]. Warner I, 827 F. Supp. at 263.

[FN72]. See *id.*; see also Warner v. Orange County Dep't of Probation (Warner II), 870 F. Supp. 69, 71 (S.D.N.Y. 1994) (stating that many AA meetings Warner attended opened with the Serenity Prayer and all concluded with the Lord's Prayer), *aff'd*, No. 95-7055, 1996 U.S. App. LEXIS 23432 (2d Cir. Sept. 9, 1996), petition for reh'g filed, (Sept. 25, 1996). For the text of these prayers, see *supra* note 20.

[FN73]. Warner had brought an earlier suit in local criminal court based on a Free Exercise claim; however, the case was dismissed as moot after Warner's probation officer provided him with a list of alternatives to AA that did not emphasize God or spirituality. See Warner I, 827 F. Supp. at 263. The Warner I court likewise based its mootness conclusion on the existence of these alternatives to AA. See *id.* at 263-64.

[FN74]. See *id.* at 264, 269.

[FN75]. See *id.* at 266.

[FN76]. See *id.*

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[FN77]. See *id.*

[FN78]. See *id.*

[FN79]. See [Lee v. Weisman, 505 U.S. 577, 593 \(1992\)](#); see also *supra* note 59 and accompanying text (discussing Lee Court's distinction between children and adults).

[FN80]. [Warner I, 827 F. Supp. at 267-68.](#)

[FN81]. See [id. at 268.](#)

[FN82]. See [Warner v. Orange County Dep't of Probation \(Warner II\), 870 F. Supp. 69, 70 \(S.D.N.Y. 1994\)](#), *aff'd*, No. 95-7055, 1996 U.S. App. LEXIS 23432 (2d Cir. Sept. 9, 1996), petition for reh'g filed, (Sept. 25, 1996). Warner did not raise any claims under the Free Exercise Clause of the First Amendment. See *id.* at 70 n.1.

[FN83]. *Id.* at 70-71.

[FN84]. *Id.* at 72.

[FN85]. See *id.* at 70-72.

[FN86]. *Id.* at 72 (alteration in original) (citation omitted) (quoting [Lee v. Weisman, 505 U.S. 577, 587 \(1992\)](#)).

[FN87]. *Id.*

[FN88]. The nominal damages award is attributable in part to the Warner II court's conclusion that Warner's freedom of conscience was not violated because he refused to participate in the AA meetings. See *id.* at 73-74.

[FN89]. See *id.* The Warner II court also addressed whether the Department of Probation, by coercing probationers to participate in religious exercise, established a state religion or religious faith. See *id.* at 72-73. Although it recognized that Lee did not mandate such an inquiry because "any time the government coerces anyone to support or participate in religion or its exercise, it is acting in a way that establishes a state religion, or tends to do so," the court concluded that the case warranted the additional analysis because AA imposed as a probationary condition was contextually different from the graduation ceremony in Lee. *Id.* The court stated that because AA engaged in the functional equivalent of religious exercise, the practical effect of coercing Warner to attend AA meetings 'is to tend towards a state- mandated and state-approved religion.' *Id.* at 73. This analysis provided further support for the court's conclusion that the Department of Probation violated the Establishment Clause. See *id.* at 73-74.

In passing, the court, recognizing the potential disruptiveness of its holding on the Department of Probation's legitimate

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rehabilitative efforts, stated that any Establishment Clause concerns might simply be avoided by providing a nonspiritual alternative recovery program. See *id.* at 73; see also *supra* note 73 (noting that Warner I court based its mootness conclusion as to Warner's request for injunctive relief on his being furnished list of acceptable AA alternatives); *infra* Parts II.C, III.B (discussing significance of probationer choice where alcohol-related self-help programs are conditions of probation).

[FN90]. The opinion of the court originally appeared in the advance sheet at [95 F.3d 202](#).

[FN91]. The majority and dissent disagreed on this point. In Warner III, one learns for the first time that Warner, following the advice of his attorney, sampled AA meetings prior to sentencing yet made no objection to their religious nature at the time of sentence. See *Warner v. Orange County Dep't of Probation* (Warner III), No. 95-7055, 1996 U.S. App. LEXIS 23432, at \*14 \*16 (2d Cir. Sept. 9, 1996), petition for reh'g filed, (Sept. 25, 1996). The dissent therefore argued that the Department of Probation's recommendation could not be considered the proximate cause of Warner's injury and that Warner's conduct amounted to consent. See *id.* at \*34 \*43 (Winter, J., dissenting). The majority rejected both of these arguments. Regarding proximate cause, the majority concluded that it was reasonably foreseeable that the recommendation would result in harm and that Warner would not object to it--whether because he was unaware of any legal basis to do so, or, aware of his rights, he was simply afraid of irritating the sentencing judge 'by objecting to the standard recommendation of the probation department.' *Id.* at \*14 \*16 (opinion of the court). Rejecting the consent argument, the court stated that Warner attended AA meetings prior to sentencing to demonstrate his commitment to rehabilitation, and that this was not equivalent to consenting to attend religious exercise. See *id.* at \*15\*16. The majority did note that it might have agreed with Judge Winter had 'Warner either suggested A.A. as a condition of probation, or somehow communicated his agreement to such a condition.' *Id.* at \*15.

[FN92]. A large portion of the Second Circuit's opinion was dedicated to liability and immunity arguments made by the Department of Probation. This Note, however, exclusively focuses on the court's Establishment Clause analysis.

[FN93]. See Warner III, 1996 U.S. App. LEXIS 23432, at \*27. Even Judge Winter in dissent was willing to "assume that the religious aspects of A.A. are sufficient to trigger a violation of ... the Establishment ... Clause if the other requisites of such claims are met." *Id.* at \*43 (Winter, J., dissenting).

[FN94]. *Id.* at \*28 (opinion of the court) (emphases added) (citations omitted). In support of this proposition, the court cited [Griffin v. Coughlin](#), 673 N.E.2d 98 (N.Y. 1996), cert. denied, [117 S. Ct. 681 \(1997\)](#), and [O'Connor v. California](#), 855 F. Supp. 303 (C.D. Cal. 1994). See Warner III, 1996 U.S. App. LEXIS 23432, at \*29 & n.9.

[FN95]. Warner III, 1996 U.S. App. LEXIS 23432, at \*32\*33 & n.11 (specifically rejecting Department of Probation's reliance on Establishment Clause tests adopted in [Marsh v. Chambers](#), 463 U.S. 783 (1983), and [Lemon v. Kurtzman](#), 403 U.S. 602 (1971)) (quoting [Lee v. Weisman](#), 505 U.S. 577, 587 (1992)) .

[FN96]. See *id.* at \*30 \*31.

[FN97]. See *id.*

[FN98]. *Id.*

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[FN99]. *Id.* at \*43 \*47 (Winter, J., dissenting) (citation omitted).

[FN100]. See [463 U.S. 388, 390-91 \(1983\)](#).

[FN101]. *Id.* at 397.

[FN102]. *Id.* at 399.

[FN103]. See [474 U.S. 481, 482 \(1986\)](#).

[FN104]. *Id.* at 487. In *School District of Grand Rapids v. Ball*, the Court held that a school district violated the Establishment Clause by financing--for primarily parochial school students--classes taught by teachers hired by the public school system and conducted in leased classrooms in nonpublic schools. See [473 U.S. 373, 397-98 \(1985\)](#); see also [Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 794, 798 \(1973\)](#) (striking down on Establishment Clause grounds New York statute providing maintenance and repair grants and reimbursement grants to religious schools, as well as providing income tax benefits to parents of children attending religious schools).

[FN105]. See [Witters, 474 U.S. at 487-88](#); see also [Rosenberger v. Rector & Visitors of the Univ. of Va., 115 S. Ct. 2510, 2541-42 \(1995\)](#) (Souter, J., dissenting) (stating that direct/indirect distinction was critical to the Court's holdings in *Mueller* and *Witters*); [Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1, 8-14 \(1993\)](#) (holding that school district did not violate the Establishment Clause by furnishing deaf student attending Catholic high school with sign-language interpreter because government program was generally applicable and attending parochial school was result of purely private choice).

[FN106]. See [Ball, 473 U.S. at 382](#) (stating that the Establishment Clause requires government to 'maintain a course of neutrality among religions, and between religion and nonreligion').

[FN107]. This statement assumes that the choice is real and not nominal. See *infra* Part III.B (discussing real versus nominal choice).

[FN108]. One might argue that the financial aid cases are distinguishable from the mandatory self-help attendance cases because in the former situation the government is merely allowing a choice to be made, whereas in the latter the government is forcing a choice to be made. This distinction, however, is without merit. The important feature here is that in both cases the respective governing provisions are generally applicable. Consider, for example, state compulsory education laws. Assuming *arguendo* that parents had no fundamental right to direct the education of their children, see [Pierce v. Society of Sisters, 268 U.S. 510, 534-35 \(1925\)](#) (holding that parents have a substantive due process right to 'direct the upbringing and education of children under their control') and [Meyer v. Nebraska, 262 U.S. 390, 400 \(1923\)](#) (stating that the right of parents to direct the education of their children is 'within the liberty of the [Fourteenth] Amendment'), compulsory education is closely analogous to compulsory participation in alcohol support programs. If a state ordered children to attend only sectarian educational institutions in order to fulfill educational requirements, the Establishment Clause would certainly be violated. Allowing parents and children to satisfy the compulsory attendance

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law by granting them a choice between sectarian and nonsectarian institutions, however, does not implicate the Establishment Clause.

[FN109]. See [O'Connor v. California, 855 F. Supp. 303, 304 \(C.D. Cal. 1994\)](#).

[FN110]. See [id. at 304](#).

[FN111]. [Id.](#)

[FN112]. See [id. at 305](#). For a discussion of post-O'Connor amendments made to the additional county requirements provision, see *infra* Part III.C.

[FN113]. See [O'Connor, 855 F. Supp. at 305](#).

[FN114]. See [id.](#)

[FN115]. In several states, Rational Recovery is considered a secular alternative to AA. See Jean Latz Griffin, *New Route to Recovery Catching On*, *Chi. Trib. (Northwest ed.)*, May 29, 1994, at 1. Unlike AA, Rational Recovery is not a twelve-step program and does not emphasize alcoholics' powerlessness over alcohol or their need to turn their lives over to a higher power. See [id.](#)

[FN116]. [O'Connor, 855 F. Supp. at 306-08](#). Presumably because O'Connor did not claim that he was coerced to attend AA, the O'Connor court neither applied Lee, nor discussed its reasons for not doing so. See [id. at 305](#) (discussing O'Connor's claim).

[FN117]. [Id. at 307](#).

[FN118]. [Id. at 308](#).

[FN119]. [Id. at 307](#).

[FN120]. See [id. at 307-08 & n.6](#). See generally *supra* note 14 and accompanying text (discussing monotheistic underpinning of AA).

[FN121]. [O'Connor, 855 F. Supp. at 308](#).

[FN122]. [Id. at 306](#).

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[FN123]. See id. at 308.

[FN124]. Id. Rational Recovery meetings were offered in Orange County approximately five times per week. See id. at 305.

[FN125]. See *Warner v. Orange County Dep't of Probation* (Warner III), No. 95-7055, 1996 U.S. App. LEXIS 23432, at \*28\*29 & n.9 (2d Cir. Sept. 9, 1996), petition for reh'g filed, (Sept. 25, 1996).

[FN126]. *Warner v. Orange County Dep't of Probation* (Warner II), 870 F. Supp. 69, 73 (S.D.N.Y. 1994), aff'd, No. 95-7055, 1996 U.S. App. LEXIS 23432 (2d Cir. Sept. 9, 1996), petition for reh'g filed, (Sept. 25, 1996); see also *Kerr v. Farrey*, 95 F.3d 472, 480 (7th Cir. 1996) ('In ... O'Connor, the court found no violation because the AA program was one of a variety of options available to the convicted driver, any of which would satisfy the condition of his probation.' (citation omitted)); *Griffin v. Coughlin*, 626 N.Y.S.2d 1011, 1014-15 (App. Div. 1995) (stating that O'Connor court upheld self-help group participation requirement 'because the plaintiff was offered other options including, as an alternative, a nonspiritual-oriented recovery program'), rev'd on other grounds, 673 N.E.2d 98 (N.Y. 1996), cert. denied, 117 S. Ct. 681 (1997).

[FN127]. Judge Winter, dissenting in Warner III, believed that Warner freely chose to attend AA. See Warner III, 1996 U.S. App. LEXIS 23432, at \*34 \*36 (Winter, J., dissenting); see also supra note 91 (discussing Warner III majority and dissent's disagreement over this issue).

[FN128]. In the case of compulsory AA this conclusion follows whether coercion is defined as psychological coercion, legal coercion, or both. See supra text accompanying notes 6064 for a discussion of these terms. In reaching its holding, the Warner III court, recognizing the powerful indoctrinating force of the AA program, rejected the Department of Probation's argument that as an adult, Warner, unlike the students in Lee, was not susceptible to psychological coercion. See Warner III, 1996 U.S. App. LEXIS 23432, at \*30\*31; see also supra text accompanying notes 96-98 (presenting Warner III court's response to the Department of Probation).

Likewise, compulsory AA is legally coercive. Although Justice Scalia disagreed with the Lee Court's conclusion that state-induced psychological coercion to participate in religious exercise violates the Establishment Clause, he did acknowledge that the Establishment Clause forbids coercion 'by force of law and threat of penalty.' *Lee v. Weisman*, 505 U.S. 577, 640 (1992) (Scalia, J., dissenting). Therefore, because it is the state that is directing the probationer to attend AA and because a probationer's failure to attend AA would result in the penalty of incarceration, Justice Scalia most likely would agree that compulsory AA as a probationary condition is legally coercive.

[FN129]. Warner III, 1996 U.S. App. LEXIS 23432, at \*33 n.11.

[FN130]. See Mark J. Beutler, Public Funding of Sectarian Education: Establishment and Free Exercise Clause Implications, 2 Geo. Mason Indep. L. Rev. 7, 58 (1993) ('The Establishment Clause places obligations on government whereas the Free Exercise Clause vests rights in individuals.'). This assertion calls into question the majority's statement in Warner III that its ruling might have been different had Warner either explicitly or implicitly communicated his consent to attend AA. See Warner III, 1996 U.S. App. LEXIS 23432, at \*15; see also supra note 91 (discussing whether Warner consented to AA participation).

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[FN131]. O'Connor was faced with a similar probationary requirement. See [O'Connor v. California, 855 F. Supp. 303, 304 \(C.D. Cal. 1994\)](#).

[FN132]. Rational Recovery has approximately 600 treatment groups located throughout the United States and Canada, serving less than 10,000 clients. See Self-Help Advocate Says Field Must Escape AA's Tentacles, *Alcoholism & Drug Abuse Wkly.*, June 24, 1996, at 1, 5. Secular Organization for Sobriety has 20,000 members worldwide. See David Gelman et al., *Clean and Sober--And Agnostic*, *Newsweek*, July 8, 1991, at 62, 62. For AA's membership statistics, see *supra* note 10 and accompanying text.

[FN133]. See Warner III, 1996 U.S. App. LEXIS 23432, at \*48 n.7 (Winter, J., dissenting) ('It is conceivable that in some areas the only rehabilitative program available, e.g., A.A., has some religious content.');

Smith, *supra* note 9, at 307 & n.82 (noting that AA is the only self-help program in many parts of the country, particularly outside major cities).

[FN134]. Notably, a paradox arises where AA is the only available self-help program and self-help participation is the standard alternative to incarceration. Namely, to avoid constitutional violation, the court in this case must sentence the offender to incarceration, rather than probation conditioned on self-help group attendance. A simple solution might be the adoption of rehabilitative alternatives other than support group attendance. Because rehabilitation is the purpose behind sentencing a DWI offender to conditional probation rather than to incarceration, whether these alternatives are satisfactory may very well be contingent on their efficacy. Moreover, notwithstanding the frequency with which AA attendance is required as a condition of probation, the efficacy of AA both inside and outside the context of probation has been questioned. See Jerome O'Callaghan, *Alcohol, Driving and Public Policy: The Effectiveness of Mandated A.A. Attendance for DWI Offenders*, 7(4) *Alcoholism Treatment Q.*, 1990, at 87, 94-97 (discussing efficacy of compulsory AA as DWI probationary condition); Thoreson & Budd, *supra* note 12, at 158-59, 174-75; see also *infra* note 145 (examining alternatives to self-help group participation available under California's DWI "additional program" requirements provisions).

[FN135]. [Warner v. Orange County Dep't of Probation \(Warner I\)](#), 827 F. Supp. 261, 265 n.1 (S.D.N.Y. 1993); see also Smith, *supra* note 9, at 307 (stating that in certain locales AA may be the only free self-help group).

[FN136]. [O'Connor](#), 855 F. Supp. at 305.

[FN137]. See [id.](#) at 305-06.

[FN138]. [Id.](#) at 308.

[FN139]. O'Connor only claimed that 'the endorsement and promotion of AA by the State through its approval of County alcohol programs violated the Establishment Clause of the First Amendment.' [Id.](#) at 305.

[FN140]. See Department of Alcohol and Drug Programs, Proposed Changes to Chapter 3, Division 4, Title 9 of the California Code of Regulations, Additional County Requirements, Final Statement of Reasons *passim* (1995) [[hereinafter Final Statement of Reasons] (on file with the Columbia Law Review). According to the California Department of Alcohol and Drug Programs, in *O'Connor v. State*, the court determined that 12-step groups, such as Alcoholics Anonymous, contain a spiritual component. Thus the Department cannot require participants to attend 12-

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step groups, without providing other alternatives, because such a requirement could violate the establishment clause of the first amendment to the U.S. Constitution." *Id.* at 6.

[FN141]. The amended version of [Cal. Code Regs. tit. 9, s 9860](#) was filed on September 22, 1995 and became effective on October 22, 1995.

[FN142]. [Cal. Code Regs. tit. 9, s 9860\(a\) \(1992\)](#) (amended 1995).

[FN143]. See *id.* [s 9860\(c\) \(1996\)](#).

[FN144]. See *id.* [s 9860\(c\)\(1\)](#) ('If the list includes sectarian groups, such as Alcoholics Anonymous ... the list shall also include non-sectarian groups.' (emphasis added)).

[FN145]. See *id.* [s 9860\(c\)\(2\)\(A\)-\(B\)](#). Alternatives to self-help group meetings include completing alcohol-related community service, attending DWI- victim impact panels, completing institutional visits (e.g., tours of prisons, hospitals, or morgues), maintaining a scrapbook of alcohol abuse-related articles, completing reports on alcohol abuse-related books, videotapes, or audiotapes, or attending personal growth and development workshops related to alcohol use. See *id.* [s 9860\(b\)\(2\)-\(7\)](#). Along with self-help group attendance, these are the only additional county requirements a county may implement. See *id.* [s 9860\(c\)](#). These activities were chosen based on the results of a survey conducted by the Department of Alcohol and Drug Programs wherein DWI programs responded that these were the actual activities they require participants to complete. See Final Statement of Reasons, *supra* note 140, at 37; see also Department of Alcohol and Drug Programs, Proposed Changes to Chapter 3, Division 4, Title 9 of the California Code of Regulations, Additional County Requirements, Initial Statement of Reasons 5 (1995) [[hereinafter Initial Statement of Reasons] (on file with the Columbia Law Review) (stating that Department included as alternatives 'requirements favored by most programs and most county alcohol program administrators'). During the Department of Alcohol and Drug Programs's October 19, 1994, public hearing regarding the proposed regulatory changes, the efficacy of several of these activities was called into question. See Final Statement of Reasons, *supra* note 140, at 17-18 (individual questioning efficacy of institutional visits and scrapbook alternatives). Rejecting these criticisms, the Department stated: 'Counties are not required to use [the challenged alternative] as an additional county requirement if they do not wish to do so.' *Id.*; see also *supra* note 134 (noting that efficacy of various methods of DWI rehabilitation has been challenged).

[FN146]. [Cal. Code Regs. tit. 9, s 9860\(d\)](#).

[FN147]. See *id.* [s 9860\(c\)\(1\)](#); see also *supra* note 144 for the text of this provision.

[FN148]. During the course of writing this Note, the author had occasion to discuss its topic with many people, including judges, lawyers, law professors, and law students, as well as people unaffiliated with the law. The overwhelming majority of these people were simply unaware of AA's religious nature. This leads the author to wonder whether unfamiliarity with AA's tenets among probation officers and sentencing judges likewise exists, and is in fact one reason why AA is explicitly implemented as a probationary condition as often as it is. This unfamiliarity with the religious nature of AA may in part be attributable to AA's emphasis on the importance of member anonymity. The Big Book and both the eleventh and twelfth Traditions stress the significance of anonymity to the AA organization. See Big Book, *supra* note 7, at xiii; Twelve Traditions, *supra* note 16, at 180-87.

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[FN149]. See [Cal. Code Regs. tit. 9, s 9860\(c\)](#); see also infra text accompanying note 156 for the text of this provision.

[FN150]. [Cal. Code Regs. tit. 9, s 9860\(j\)](#). Program fee means 'a fee charged to the participant by the program for program services.' Id. s 9800(a)(21). Program is defined as 'a firm, partnership, association, corporation, or local government agency, which has been recommended by the county board of supervisors and subsequently licensed ... to provide alcohol and other drug education and counseling services.' Id. s 9800(a)(6). Program services means 'all services, which the program is required to provide to the participant.' Id. s 9800(a)(22).

[FN151]. Initial Statement of Reasons, supra note 145, at 6.

[FN152]. [Cal. Code Regs. tit. 9, s 9878\(d\)](#). The standardized payment schedule:

(A) Describes how the program assesses the program fee and additional fees; (B) Lists the amount of the program fee and additional fees charged by the program, the amount of down payment required, the amount and frequency of payments, and the income levels at which the program will allow the participant to pay a maximum fee of no more than \$5.00 per month, to pay a reduced program fee, or to extend payments, in accordance with the provisions of [Section 9878](#); and (C) Contains a sample of the participant contract and all forms used by the program to determine the program fee, additional fees, down payment, and payment schedule.

Id. s 9800(a)(25)(A)-(C); see also id. [s 9878\(d\)\(1\)\(A\)-\(G\)](#) (listing specifications of standardized payment schedule). Additional fee means "a fee charged to the participant by the program to recover the cost of any administrative service (such as rescheduling program services, reinstating participants following dismissal, processing transfers to other programs, etc.)." Id. s 9800(a)(1).

[FN153]. See id. [ss 9878\(f\), 9879](#).

[FN154]. See id. [s 9879\(b\)\(2\)](#).

[FN155]. Id. [s 9860\(c\)\(2\)\(B\)](#).

[FN156]. Compare id. [s 9860\(c\)\(2\)\(A\)](#) ('The only self-help groups available in the county are sectarian in nature.') with id. [s 9860\(c\)\(2\)\(B\)](#) ("Non-sectarian groups are not available or accessible to the participant.").

[FN157]. See id. [s 9860](#); see also id. s 9800 (defining terms appearing in [section 9860](#)).

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